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3 Orig'l.
O.T. 1906

In the Supreme Court

of the United States.

October Term, 1906

THE STATE OF KANSAS, *Complainant,*
vs.
THE STATE OF COLORADO *et al.*, *Defendants.*
} No. 3 Original.

Answer of the State of Kansas to the Petition of Intervention on Behalf of the United States.

In the Supreme Court

of the United States.

October Term, 1903.

THE STATE OF KANSAS, *Complainant,*
vs.
THE STATE OF COLORADO *et al.*, *Defendants.*
No. 7. Original.

Answer of the State of Kansas to the Petition of Intervention on Behalf of the United States.

THIS complainant, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties or imperfections in the said petition of intervention, for answer thereto, or to so much thereof as this complainant is advised it is material or necessary for it to make answer to, answering, says:

That it denies each and every, all and singular the allegations contained in said petition of intervention which are contrary to or in conflict with the amended bill of complaint filed herein.

C. C. Coleman

Attorney-general,

A. H. Loomis

F. Dumont Smith

S. S. Ashbaugh.

Attorneys for Complainant.

No. 1
No. 19 Orig?
Brf. of Godard & West for Compl
Filed May 20, 1901.

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In the Supreme Court
of the United States.

THE STATE OF KANSAS, *Complainant,*
vs.
THE STATE OF COLORADO, *Defendant.*

3 Orig'l.
O. T. 1906

BRIEF OF COMPLAINANT UPON MOTION FOR LEAVE TO FILE BILL.

A. A. GODARD,
Attorney General.

J. S. WEST,
Assistant Attorney General.

In the Supreme Court
of the United States.

THE STATE OF KANSAS,
Complainant,
vs.
THE STATE OF COLORADO,
Defendant.
} *No.* ——

BRIEF OF COMPLAINANT UPON MOTION FOR LEAVE TO FILE BILL.

This motion is filed by authority of the governor of the state of Kansas, and in pursuance of Senate concurrent resolution No. 14, adopted by the legislature in February, 1901, as follows:

Whereas, It is a matter of common notoriety that the waters of the Arkansas river for some time past have been and are now being diverted from their natural channel by the state of Colorado and its citizens, to the great damage of the state of Kansas and its inhabitants; and

Whereas, It is threatened not only to continue but also to increase said diversion: therefore, be it

Resolved by the Senate, the House of Representatives concurring therein, That the attorney general be requested to institute such legal proceedings, and to

render such assistance in other proceedings brought for the same purpose, as may be necessary to protect the rights and interests of the state of Kansas and the citizens and property owners thereof.

The question of the complainant's right to the relief it seeks in this suit is to be determined entirely by the rules of the common law, irrespective of any customs, regulations or laws of the state of Colorado in derogation thereof. The rules and doctrines of the common law respecting the rights and remedies of riparian owners have never been abrogated or in any manner modified by the state of Kansas or its legislature. The common law has been in force in both Kansas and Colorado since long prior to their admission into the union. (Laws of Louisiana and Missouri, 1824, ch. 154; Sayles' Early Laws of Texas, art. 707, sec. 1.)

The state of Colorado has never derived from the United States nor from any other source a right of exclusive or unreasonable appropriation of the waters of the Arkansas river for any purpose, as against the state of Kansas or its citizens, as riparian proprietors. "As a general proposition, every riparian proprietor has a natural and equal right to the use of the water in the stream adjacent to his land, without diminution or alteration." (Washburn on Easements, p. 319; Gould, Waters, § 204.)

By the common law, the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil and passes with it, not as an easement and appurtenance, but as part and parcel of it. Use

does not create the right, and disuse cannot destroy or suspend it. (Lux v. Haggin, 69 Cal. 255.)

Where natural conditions are such that the riparian proprietor is permitted to make use of the stream for the purpose of irrigation, and thus by that use to divert a portion of it, it is held that such diversion, under all circumstances, must be *a reasonable use* of the stream, and that the *surplus* of the water thus used must be returned into its natural channel. (Newhall v. Ireson, 8 Cush. 595.)

The same doctrine is clearly stated in Gould on Waters, section 217:

"The right of a riparian proprietor to divert the waters of a stream for the purpose of irrigation is recognized in England and generally in this country. According to the later decisions in both countries, this is not a natural want, authorizing an exclusive or undue appropriation by one proprietor, but the use of the stream for this purpose must be reasonable, and must not materially affect the application of the water by other riparian proprietors. The extent of each proprietor's right to thus withdraw the water depends upon the circumstances of the case. The owner of a large tract of porous land, abutting on one part of the stream, could not lawfully irrigate such land continually by canals and drains, and so cause a serious diminution of the quantity of water, though there may be no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for the purpose. If the water used for irrigation is not abstracted on a person's own land, but is withdrawn at a distance above it, or returned at a distance below it, this would have a material bearing upon the question of reasonable use with respect to an opposite or other proprietor affected by such diversion. So a riparian proprietor who obstructs the stream by a dam for the purpose of overflowing and irrigating his land, or who diverts the

water for such purpose excessively, and without returning the surplus into the natural channel, is liable to the owner of a mill below, the operation of which is thereby impeded, or to another proprietor below who only uses the water for irrigation, and is deprived of that right to an unreasonable extent."

If it be conceded, therefore, that by the common law the state of Colorado or any of its citizens is authorized to use the waters of the Arkansas river for irrigation purposes, such use must be at all times subject to conditions that it is reasonable and not prejudicial to the rights of lower riparian proprietors; and if, as alleged in the bill, it is the purpose of acts now contemplated by the state of Colorado, or it is the present effect of acts already done under license and authority granted by that state, to appropriate all or an unreasonable portion of the waters of the Arkansas river, or of its tributaries in Colorado, to the detriment and in violation of the rights of the state of Kansas or of its citizens as lower riparian owners upon said stream, it is clear that the complainant may invoke the protection of the common law against such palpable invasion of its rights.

All of the lands situate in the valley of the Arkansas river or abutting upon that stream, as mentioned in the bill, were formerly a part of the public domain of the United States; and when the United States ceased to be the owner of those lands, and the title thereto passed to settlers, grantees, and purchasers, the riparian rights of the common law passed therewith to such settlers, grantees and purchasers as a natural incident to and one of the elements of their title, and relating back to the date of settlement or

purchase. The riparian rights thus acquired by such settlers, grantees, and purchasers, whether still held by them or passed to subsequent grantees, can be destroyed or impaired only in the interest of the general public, upon full compensation, and in accordance with established law. (Clark v. Cambridge & A. Irr. & Imp. Co. *et al.*, 45 Neb. 798.)

No matter of prior appropriation nor any authority conferred by an act of congress can be claimed to have clothed the state of Colorado with any right or justification to do the acts and things complained of in the bill. The purpose and intent of the act of congress approved July 26, 1866, as amended by the act approved July 9, 1870, was clearly set forth in Benton v. Johnsox, 17 Wash. 277.

In delivering the opinion in that case, ANDERS, J., said:

"By the common law, says the court in Lux v. Haggin, 69 Cal. 255, 10 Pac. 753, 'the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned.' And one of the purposes thereafter mentioned was irrigation. In Washburn on Easement and Servitudes (4th ed., pp. 316, 317), the learned author says: 'The right of enjoying this flow without disturbance or interruption by any other proprietor is one *jure naturæ*, and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring landowner. It

is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or twenty years' adverse possession.' And the law on this subject is laid down by Professor Pomeroy in language equally clear and explicit. He says: 'The use of the stream, and of the water flowing through it, forms a part of the rights incident to and involved in the ownership of the lands upon its borders. This is the principle recognized by the common law, and which should be recognized by any auxiliary legislation. It is, moreover, a natural law, an inevitable fact, which no legislation can change. Any statute denying this fact simply attempts an impossibility.' Pom. Rip. Rights, § 152.

"While the doctrine announced by the foregoing authorities has never, so far as we are advised, been directly denied, it has been apparently ignored by the courts in some of the Pacific states and territories, on the theory that the principles and rules of the common law respecting the rights of private riparian owners were inapplicable to the condition and necessities of the people of the particular localities where the causes of action arose. Coffin v. Ditch Co., 6 Colo. 446; Drake v. Earhart (Idaho), 23 Pac. 542; Stowell v. Johnson (Utah), 26 Pac. 290; Mover v. Preston (Wyo.), 44 Pac. 854; Clough v. Wing (Ariz.), 17 Pac. 453; Trambley v. Luterman (N. M.), 27 Pac. 312. And the decisions above cited are presumably in accordance with the local statutes, though some of them, it appears, were grounded solely upon the assumption that the rules of the common law were inapplicable, by reason of the aridity of the soil and the consequent necessity for extensive irrigation. But how it can be held that that which is an inseparable incident to the ownership of land in the Atlantic states and the Mississippi valley is not such an incident in this or any other of the Pacific states, we are unable to clearly comprehend. It certainly cannot be true that a difference in climatic conditions or geographical position can operate to deprive one of a right of property vested in him by a well-settled rule of common law. The mere fact that

the appellants will not be able to occupy or cultivate their lands as they heretofore have done unless they can irrigate them with water taken from the Ahtanum river is no sufficient reason for depriving the respondents, who settled upon that stream in pursance of the laws of the United States, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent and without compensation. If it be true, as claimed by appellants, that if the judgment of the court below is affirmed their lands will again become a barren waste, and cease to 'blossom as the rose,' it is equally true that if the waters of the river are diverted from its channel the premises of the respondents will become unproductive and utterly worthless. 'The aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated.' McKinstry, J., in Lux v. Higgin, *supra*. The question of the applicability of the common law in controversies respecting water rights in the mineral districts of California was lucidly discussed by Chief Justice Sanderson in Hill v. Smith, 27 Cal., at page 482.

"With reference to the charge of the trial court, which seemed to be based on an erroneous view of the law with respect to the rights of miners and ditch owners using the water of a stream for mining purposes, the learned chief justice said: 'This is due in a great measure, doubtless, to the notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this state, upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is

without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, '*Sic utere tuo ut alienum non lædas*,' upon which they are grounded, has lost none of its governing force. On the contrary, it remains now, and in the mining regions of this state, as operative a test of the lawful use of the water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel—*ubi currere solebat*—without diminution or alteration, it does so because its flow imparts fertility to his land, and because water, in its pure state, is indispensable for domestic uses. . . . It was for the purpose of protecting the rights of appropriators of water for beneficial uses on the public lands which had vested and accrued, by virtue of local customs, laws, and decisions of courts, that the ninth section of the act of congress of July 26, 1866, the substance of which is included in section 2339 of the Revised Statutes, was enacted. It was apparent to congress, and indeed to every one, that neither local custom nor state laws or decisions of state courts could vest the title to public lands or water in private individuals without the sanction of the owner, viz., the United States. The government, being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands; but when it disposed of land without reserving the water, the latter passed to its grantee free from interference thereafter by the grantor. 'The object of the section (Rev. St., § 2339) was to give the sanction of the United States, the proprietor of the lands, to possessory rights which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the land.' Jennison v. Kirk, 98 U. S. 456, 457.

"It is suggested on behalf of the appellants that the use of water for irrigation was practically unknown to the common law. But while it may be true that it is

seldom necessary or desirable to irrigate land in England by artificial means, yet it appears that a reasonable use of running streams for that purpose by riparian proprietors is recognized by the courts of that country. It is expressly so stated in Gould on Waters (section 217), where a number of English cases are cited; and in Pomeroy on Riparian Rights (section 125), it is declared that the common-law rule that every riparian proprietor has an equal right to the use of water as it is accustomed to flow, without diminution or alteration, is subject to the well-recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural and manufacturing purposes; and the author there cites several English and many American decisions in support of that declaration."

Moreover, the riparian rights appertaining to the Kansas lands in the Arkansas valley, mentioned in the bill, became vested in the state of Kansas and in the private owners and occupants of said lands prior to the appropriation by the state of Colorado of the waters of the Arkansas river for irrigation purposes, and prior to the commission of any of the wrongs complained of in the bill. No prior right, therefore, to the appropriation or use of said waters for irrigation or other purposes has accrued to the state of Colorado which can be claimed to warrant or justify either the wrongs it now threatens or those already done as charged in the bill.

In the case of Sturr v. Beck, 133 U. S. 541, Chief Justice FULLER, in delivering the opinion of the court, said:

"The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot

be lawfully diverted against his consent, is not denied, nor does the controversy relate to the just and reasonable use as between riparian proprietors. The question raised is whether Smith occupied the position of a riparian proprietor or a prior appropriator, as between himself and Sturr, when the latter undertook to locate his alleged water right. At that time Smith had been in possession for three years, and his homestead entry had been made over a year. . . . And as to mere settlement with the intention of obtaining title under the preemption laws, while it has been held that no vested rights in the lands as against the United States is acquired until all the prerequisites for the acquisition of title have been complied with, yet rights in parties as against each other were fully recognized as existing, based upon priority in the initiatory steps, when followed up to a patent. 'The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants.' Shepley v. Cowan, 91 U. S. 330, 337.

"Section 2339 of the Revised Statutes, which is in substance the ninth section of the act of congress of July 26, 1866 (14 Stat. 253), provides: 'Whenever, by priority of possession, rights to the use of water, for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local custom, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.' This section, said Mr. Justice MILLER, in Broder v. Water Co., 101 U. S. 274, 276, 'was rather a voluntary recognition of a preexisting right of possession, constituting a valid claim to its continued use, than the establishment of a new one.'

"By section 17 of the act of July 9, 1870, amendatory of the act of July 26, 1866, it was provided, among other things, that 'all patents granted or preemption or homesteads allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such

water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.'—16 Stat. 218. And this was carried forward into section 2340 of the Revised Statutes, and Smith's patent was subject to that reservation.

"The ninth section of the act of 1866 is referred to by Mr. Justice FIELD in Atchison v. Peterson, 87 U. S., 20 Wall. 507, 512, and in the opinion it is said that 'the government being the sole proprietor of all the public lands, whether bordering upon streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams.'

"When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished, except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

But in any view of the common-law rights of the riparian owner, he is not permitted to divert and appropriate the waters of a stream for irrigation or other purposes on lands which are non-riparian. Nor does the right of the subjacent riparian owner to an injunction against such unlawful diversion or appropriation depend on the amount of injury he thereby sustains. This doctrine is clearly stated in Gould v. Eaton, 117 Cal. 539, wherein HARRISON, J., in delivering the opinion, said:

"Each riparian owner is entitled to the natural flow of the stream through his land, with the limitation, however, that the superior proprietor may take therefrom such an amount as he is entitled to for riparian purposes. The superior proprietor cannot, how-

ever, divert to non-riparian lands the water which he would have a right to use for riparian purposes but which he does not in fact use. His riparian right is appurtenant to the land bordering on the stream, and does not give him the right to divert the water to lands which are not riparian to the stream; and as he cannot exercise this right himself, he cannot, as against an inferior proprietor, confer it upon another. As against himself or his grantee, he may contract for the diversion of the water to non-riparian lands. Gould v. Stafford, 91 Cal. 146, 27 Pac. 543; Yocco v. Conroy, 104 Cal. 468, 38 Pac. 107. But the rights of the inferior proprietor will not be affected by such contract. If he does not in fact use any of the water himself, the inferior proprietor has a right to the flow of the entire stream. Water-works Co. v. Potter, 3 Hurl. & Co. 300; Ormerod v. Mill Co., 11 Q. B. Div. 155; Swindon Water-works Co. v. Wilts & B. Canal Nav. Co., L. R. 7 H. L. 697. The plaintiff's right to an injunction does not depend upon the amount of injury which he has received. Being a riparian owner, he has a right to the flow of the entire stream, as against any diminution thereof by one who is not a riparian owner, and the claim of the defendants that they have a right to divert a portion of its flow authorizes him to invoke the aid of equity in order that this claim may not ripen into a right. Moore v. Water-works, 68 Cal. 146, 8 Pac. 816; Stanford v. Felt, 71 Cal. 249, 16 Pac. 900; Swindon Water-works Co. v. Wilts & B. Canal Nav. Co., L. R. 7 H. L. 705."

The bill alleges and shows that the state of Kansas has a direct and vital interest in the subject-matter of the proposed suit. The wrongs and injuries complained of, and for which no adequate relief or remedy can be obtained by a suit at law, affect the property of the complainant in its corporate capacity. Two large and valuable tracts of land described in the bill are, and have been for many years, owned and occu-

pied by the state of Kansas; and all riparian rights incident or appertaining to these lands, at all times since the title thereto was acquired from the United States, are now vested in the complainant. This suit is sought to be instituted, therefore, to protect the property of the state of Kansas, within the rule and authority of Pennsylvania v. Wheeling & B. Bridge Co., 13 How. 518, and wherein the jurisdiction of the court over an original suit in equity, such as is here proposed, is expressly and definitely affirmed. The complainant "asks from the court a protection of its property, on the same ground and to the same extent as a corporation or individual may ask it."

The state of Kansas is a party to the proposed suit in virtue of its sovereign and corporate capacity. It seeks to protect the rights and property of its citizens from wrongs and injuries against which such citizens, neither individually nor collectively, can claim protection in any court. The wrongs and injuries complained of in the bill directly affect the valued rights and the vital interests of 100,000 citizens of the state of Kansas. The usefulness and value of 2,500,000 acres of fertile land are being and are threatened to be practically destroyed. The right of the public of the state of Kansas to the free and untrammeled use of the waters of the Arkansas river in that state for public purposes is taken and threatened to be taken away, and the public health is impaired and imperiled.

If the proposed suit cannot be maintained by the state of Kansas in behalf and for the protection of its citizens who are riparian owners in the valley of the

Arkansas river, there is no means known to the law by which those citizens can be protected against the wrongs and injuries alleged in the bill. There is no forum in which their complaint can be heard or their grievances redressed. The state of Colorado cannot be brought to the bar of any court by these injured citizens; and unless the state of Kansas in its sovereign capacity, and on behalf and for the protection of the interests of its public and of these citizens, is permitted to maintain this suit, there is presented the strange anomaly of a large number of the citizens of the state, and a large and one of the most valuable portions of its territory, subjected to the wrongs and irreparable injuries of another state, without authority or power to invoke the protection of any tribunal. This condition of affairs—power to inflict such injuries, with no corresponding remedial right—finds no sanction in the maxims of equity or law.

Concurring in the opinion of the court in Louisiana v. Texas, decided January 15, 1900, Mr. Justice BROWN said:

"I am not prepared to say that if the state of Texas had placed an embargo upon the entire commerce between Louisiana and Texas the state of Louisiana would not be sufficiently representative of the great body or her citizens to maintain this bill.

"In view of the solicitude which, from time immemorial, states have manifested for the interest of their own citizens; of the fact that wars are frequently waged by states in vindication of individual rights, of which the last war with England, the opium war of 1840 between Great Britain and China and the war which is now being carried on in South Africa between Great Britain and the Transvaal republic are all notable examples; of the further fact that treaties are en-

tered into for the protection of individual rights, that international tribunals are constantly being established for the settlement of rights of private parties, it would seem a strange anomaly if a state of this union, which is prohibited by the constitution from levying war upon another state, could not invoke the authority of this court by suit to raise an embargo which had been established by another state against its citizens and their property."

The state of Kansas derives its revenue from direct taxation of real and personal property, and thus maintains its government and its system of free public schools. The diversion of the water as alleged, and the consequent injury to the land and other property in the Arkansas valley, has impaired and will greatly impair and diminish the revenues of the state, and cripple its school system, and thus the state, in its corporate and sovereign capacity, is vitally affected.

Two recent decisions, one by the circuit court and the other by this court, have so many apposite features that we desire to call especial attention to them.

The case of Pine *et al.* v. Mayor &c. of the City of New York, 103 Fed. 337, was decided by Judge SHIPMAN June 27, 1900. The city of New York had constructed near the state line, and in the state of New York, a dam which diverted more than one-fourth of the average flow of the Byram river past the plaintiffs' lands, situated in the state of Connecticut. It was here distinctly held that the right of a riparian proprietor on a non-navigable stream to the use of the ordinary flow of water, undiminished by an unreasonable use by a proprietor above him, is not an easment or appurtenance, but is inseparably annexed to the soil, and is a parcel of the land itself; that the

seizure and permanent diverting of the waters of a stream in another state by a municipal corporation without compensation to the lower owner is a continuing wrong, which is not excused by the fact that the appropriation is for the public benefit, and that injunction is the appropriate and effective remedy; also, that a statute of one state conferring power to condemn lands in another state for a public purpose would be ineffective, and that the right of the riparian owner to the remedy of injunction is not clouded by the smallness of the damages caused by the diversion.

The other case is Missouri v. Illinois, 21 Sup. Ct. Rep. 331, decided January 28, 1901. The bill alleged substantially that the state of Illinois, acting through its governor and through a municipal corporation organized under its laws, was turning the sewage of a large portion of Chicago and Cook county into the Mississippi river by means of a drainage canal, and would send into the latter river 1500 tons of filth daily, which would poison and pollute the waters and render them unwholesome and valueless for use for man and beast, and thus render worthless the water-works systems of towns and cities along the borders of the state of Missouri, and would amount to a continuing nuisance, endangering the health and lives of her inhabitants.

The defendants demurred, first, on the ground that the court had no jurisdiction of either the parties or the subject-matter; second, because the state of Missouri was not concerned, as a state, in the matters alleged; third, because the bill showed on its face that the state was in fact merely loaning its name to

the towns and individuals really concerned; fourth, that the state possesses no power to bring an original suit in this court for such purpose; fifth, that it appeared by the bill that no property rights of the state were involved; sixth, that it was not a controversy arising directly between the two states; and seventh, that the bill was informal and insufficient.

This court overruled the demurrer and gave the defendants leave to file answers to the bill.

In the decision, the court, speaking through Mr. Justice SHIRAS, said that two questions were presented: First, whether the bill disclosed a controversy between the state of Missouri and the state of Illinois and a citizen thereof, within the meaning of the constitution and statutes creating and defining the original jurisdiction of this court; and second, whether, if the allegations presented such controversy, the state of Missouri was entitled to the relief prayed for; and followed this statement of the questions involved with this language:

"The question whether the acts of one state, in seeking to promote the health and prosperity of its inhabitants by a system of public works which endangers the health and prosperity of the inhabitants of another and adjacent state, would create a sufficient basis for a controversy, in the sense of the constitution, would be readily answered in the affirmative, if regard were to be had only to the language of that instrument."

After discussing the question of jurisdiction of the tribunal provided by the articles of confederation, it is stated that under those articles the necessity of a tribunal to determine matters between two or more states was recognized, and that a court was provided for that purpose, and that its scope extended to "all

disputes and differences now subsisting, or that hereafter may arise, between two or more states, concerning boundary, jurisdiction, or any other cause whatever."

Section 2 of article 3 of the constitution is referred to, which provides that the judicial power shall extend to controversies between two or more states, and section 687 of the Revised Statutes, which provides that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, etc.

The language of Chief Justice MARSHALL, in New Jersey v. New York, 5 Pet. 285, is quoted, in which he said:

"The constitution of the United States declares that 'the judicial power shall extend to controversies between two or more states.' It also declares that 'in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction.' . . . It has then been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in suits against a state, under the authority conferred by the constitution and existing acts of congress."

The following language of Chief Justice FULLER, in Louisiana v. Texas, 176 U. S. 1, is also quoted:

"But in order that a controversy between states, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. The states cannot make war, or enter into treaties, though they may, with the consent of congress, make compacts and agreements. Where there is no agreement whose breach might create it, a controversy between states does not arise un-

less the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state."

Attention is called to the views of Chief Justice MARSHALL, in Cohen v. Virginia, 6 Wheat. 364, where he held that the constitution having given the supreme court original jurisdiction in certain cases, and appellate jurisdiction in all others, in the one class of cases the jurisdiction is founded entirely on the character of the parties and the nature of the controversy is not contemplated, while in the other the character of the case is everything, regardless of the character of the parties, and said:

"When, then, the constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the constitution or a law to be appellate, the conclusion seems irresistible that its framers designed to include in the first class those cases in which jurisdiction is given because a state is a party."

In view of the fact that the bill sought to be filed expressly shows upon its face that direct property rights belonging to the state of Kansas are involved in this suit, and that the health and prosperity of some 100,000 of its citizens are also involved, and that the state possesses no diplomatic powers, or right to make war, the following language (page 343) is significant:

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state. But such cases manifestly do not cover the entire field in which such controversies may

arise, and for which the constitution has provided a remedy; and it would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court.

"An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri was an independent and sovereign state, all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering.

"The allegations of the bill plainly present such a case. The health and comfort of the large communities inhabiting those parts of the state situated on the Mississippi river are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the state. Moreover, substantial impairment of the health and prosperity of the towns and cities of the state situated on the Mississippi river, including its commercial metropolis, would injuriously affect the entire state."

The first paragraph of the dissenting opinion is as follows:

"Controversies between the states of the union are made justiciable by the constitution because other modes of determining them were surrendered; and before that jurisdiction which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their differences can be invoked, it must appear that the states are in

direct antagonism as states. Clearly this bill makes out no such state of case."

But it is respectfully urged that the bill now sought to be filed clearly and unmistakably shows that the states of Kansas and Colorado are in direct antagonism, which inevitably affects and impairs the property rights of the complainant as well as the health and prosperity of a large number of its cities, towns, and villages, and of a vast number of its citizens.

Therefore, in view of the provisions of the constitution and statutes of the United States, and in view of the decisions of this court hereinbefore cited and referred to, including the dissenting opinion in Missouri v. Illinois, the remedy sought by the bill of complaint appears to be one to which the state of Kansas is clearly entitled, and the complainant should be granted leave to file the same.

A. A. GODARD, *Attorney General.*

J. S. WEST,
Assistant Attorney General.

No. 10 Orig.

Brf. of Godard, Ware & Ashb

IN THE SUPREME COURT

OF THE UNITED STATES.

for Complt. Contempt

THE STATE OF KANSAS,
Complainant,

vs.

THE STATE OF COLORADO,
Defendant.

No. 10.

Office Supreme Court U.S.
FILED
FEB 3 1902
JAMES H. McKENNEY,
Clerk.

Filed Feb. 3, 1902.

BRIEF OF COMPLAINANT.

A. A. GODARD,
Attorney-general of the State of Kansas,

EUGENE F. WARE,
S. S. ASHBAUGH,
Solicitors for Complainant.

3 Orig
C. T. 190

ORIGINAL PROCEEDING.

Kansas filed a complaint charging that the Arkansas river, having its source and drainage basin in Colorado, flowed into and through Kansas; that the river was an interstate river, navigable in fact through Arkansas, and treated by the United States surveys and by the executive departments as a navigable river in Kansas.

The State of Colorado has by irrigation ditches and reservoirs diverted most of the water from the river, and claims the right to divert all.

The questions discussed in this brief are:

LAW OF RIPARIAN RIGHTS.
COMMON LAW BETWEEN STATES.
U. S. STATUTES CONCERNING IRRIGATION.
VALIDITY OF COLORADO IRRIGATION LAWS.
THE LAW OF NAVIGABLE RIVERS IN UNITED STATES.
HISTORY OF COMMON LAW IN KANSAS AND COLORADO.
APPROPRIATION BY ONE STATE OF WATER FLOWING INTO ANOTHER.

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In the Supreme Court
of the United States.

THE STATE OF KANSAS, *Complainant,*
vs.
THE STATE OF COLORADO, *Defendant.*

No. 10.
Original Proceeding.

BRIEF OF COMPLAINANT FOR HEARING ON THE DEMURRER OF DEFENDANT.

SECTION 1. Statement.—General Allegations of Bill.

In the bill filed herein we have endeavored to set forth concisely the salient features of the conditions which have made the filing of this bill necessary. Some of the details stated may be unnecessary under strict rules of pleading, but we believe all of them needful to convey to the court an adequate conception of the issues we are seeking to raise and of the importance and necessity of a judicial determination of the rights here asserted.

From the bill, it will be seen that the Arkansas river, after flowing nearly 300 miles and draining 22,000 square miles of territory, an area as great as that of New Hampshire, Massachusetts and Connecticut com-

bined, enters the state of Kansas at an elevation of 3300 feet above sea-level. This Nile of the West flows 210 miles in Kansas, making fertile and valuable a valley containing 2,500,000 acres of land, an area nearly as great as the state of Connecticut.

The lands of this valley are occupied as farms; and crops are generally grown thereon. The value of the land is more than fifty million dollars, and the farmers residing thereon are upwards of 50,000 in number. An urban population about equally large reside within this area. The soil of the valley is porous and underlaid with deep beds of sand, through and in which a large portion of the water of the river flows. The rainfall is light and the tributaries in western Kansas are few and small. The result of this condition is that the fertility of the soil in this valley depends upon the flow of water in the Arkansas river from Colorado into Kansas, and the value of the land depends upon the continuation of such flow.

A large and increasing number of persons and corporations are using the water from said river in Colorado for irrigating purposes. Many of the ditches used for this purpose are of great size and many miles in length. Much of the water so diverted is emptied upon arid non-riparian lands and is lost to the stream, and each of said diversions contributes to the injury of the owners of land in the Kansas valley. Among those engaged in so diverting water and threatening further diversion is the state of Colorado, and among the riparian land-owners in Kansas is the state of Kansas.

Suits by the single riparian owners in Kansas against the persons diverting the waters of this river in Colo-

rado would involve a vast number of actions, and a vast complexity of facts and legal questions. All of the acts complained of are authorized by the state of Colorado, and that state is itself doing some of the things that are most injurious; its legislature has made provision for many more of such acts. Hence, the state of Colorado is, in contemplation, if not at present, the chief offender against the rights of property owners in Kansas. The state of Kansas is a large property owner in the valley affected. Others injured cannot reach the chief offender, which is the source of all the injuries. Hence it is in the highest degree fit that the state of Kansas should first assert its own property and sovereign rights before this, the only tribunal having jurisdiction of the proper form of action, and the only tribunal having authority to determine conflicting claims of sovereignty over a *res* that, existing in two states, is claimed by each of them.

This suit, in addition to the determination of such property interest as the state of Kansas has the right to have determined, and in addition to such questions of sovereignty and governmental right as this court may see fit to pass upon, possesses the further merit that, in this one action, it is sought to prevent a great number of other actions which should be rendered unnecessary by the result hereof.

No other branch of government has any authority or power over these conflicting claims of rights. What those rights are, and to what extent they shall be respected, are questions which now rest exclusively and conclusively with this court.

It may be remarked in passing that this suit is not

animated by the slightest desire to injure or harass the state of Colorado, or its citizens. On the other hand, the relations between the two states are friendly and cordial, and we wish to see our neighboring state prosperous and successful, and wish to restrain the acts complained of so far only as may be necessary for the protection of our property.

The Arkansas river is, in its natural condition, a generous stream, and in so far as its waters can be used in Colorado for irrigation purposes and then returned to the bed of the river, and in so far as the waters can be diminished in seasons of flood and at other times without injury to ourselves, their taking will not be resisted by us.

We wish it understood that we do not ask or expect the destruction of the irrigation ditches heretofore constructed and now used by persons and corporations in Colorado. Doubtless some restrictions should be placed upon the use of the water; but it is sought by this proceeding merely to prevent the state of Colorado from using its vast power and wealth in diverting these waters and to stop it from granting authority to others to do so.

The diverting of water from this river in Colorado began several years since. For a long time the injury was not felt or else the cause of injury was not known in Kansas. Year by year new ditches were added or old ones extended and enlarged, until our people, startled by the withering of immature crops and the falling of unripe fruit, were aroused to the fact that the taking of enormous quantities of water from this river in another state rendered their labors useless and was fast turning

their fertile farms into desert lands, and the growing injury threatened utterly to destroy all values of lands in the Arkansas valley. The subject has been agitated in Kansas for some years, until a legislative direction for the bringing of this suit resulted.

The gist of this proceeding lies in the fact that the state of Kansas is the riparian owner of lands within its boundaries, and the further fact that the state of Colorado is, if not at present, in future contemplation, a very great offender against our rights. It would avail our citizens little to proceed against the many individuals taking the water of the Arkansas river in Colorado if the state might continue and increase its appropriations of water therein. If either the citizens or the state are to be stopped from taking the water, it should be the latter, for divers apparent reasons. The injury already done is considerable, but it is trifling compared with what is threatened. It would be a great injury to the state of Colorado if its irrigation interests were now destroyed. It would be an equal or greater injury to Kansas and its people if none of the waters of the Arkansas were permitted to flow into the state. We have, therefore, come into this court, believing it to be the proper tribunal for the novel and important questions involved therein. And we come with great confidence in the merits and justness of our claim. The water of the Arkansas river should serve the needs of the two states, and not of one. Impartial justice requires that the state of Colorado and its people should be restrained from taking it all; likewise the state of Kansas should not and will not ask for all. We are not asking that a ditch be closed in

Colorado in order that one may be opened in Kansas. We are only asking that sufficient water be permitted to flow in our river to fertilize our fields in the natural way.

SEC. 2. Statement.—Wrongs Alleged in the Bill.

The bill shows that the complainant is entitled to relief from the wrongs done and threatened by Colorado for several reasons. They are:

1. The state of Kansas is the riparian owner of two large and important tracts of valuable land within its boundaries upon which are situated two of the great state institutions, namely, the state soldiers' home and the state industrial reformatory; each of these has been injured by the acts complained of and the destruction of both institutions is threatened by the defendant.

2. The state of Kansas is the owner of divers tracts of land granted to it by the United States as school lands, which are held subject to sale or are now under contract of sale, all of which lands are injured, and to which further injury is threatened by the defendant in the same way.

3. The acts complained of greatly diminish the revenues of the state of Kansas now by reducing the value of property upon which state taxes are levied, and a much greater injury is threatened. The injury done and threatened is enhanced by reason of the fact that all state taxes in Kansas are levied generally upon all property in the state and the larger part of such taxes are collected from real estate.

4. The state of Kansas holds the title to the bed of said river, throughout its length in said state, in trust

for the people and the public. The state has an interest in and a right to the flow of water therein, and it is its duty to protect such flow for the benefit of its inhabitants. The acts of the defendant in withdrawing water from said river have very nearly put an end to the flowing of the river in its accustomed channel in Kansas, thereby causing the bed to fill up with sand, and in a large measure obliterating the channel of the river in Kansas, occasioning greater damages from overflows in times of flood, and great loss and injury to the state and to all the inhabitants of said valley at all times.

5. The diversion of water from the river in Colorado, done by and under the authority of the defendant, is damaging the property of all the inhabitants of Kansas residing within the Arkansas valley, by depriving them of water needed for domestic purposes and for the watering of their animals and for the fertilizing of their farms, and by interfering with the sewage of cities, and in different ways injuring the health and interfering with the prosperity and comfort of the inhabitants of the valley.

SEC. 3. Policy of the United States Government.

Much is said in the brief of the defendant concerning the policy of the United States government regarding irrigation, and that this suit is in contravention of the theory upon which much congressional legislation has been based. Much is also said with regard to the needs of an arid country being such as to overrule the doctrines of the common law concerning riparian rights, and that, by reason of congressional action, state constitutions and statutes, and public necessities,

the doctrine of riparian rights should be considered as non-existent in the arid portion of the United States.

It is unnecessary to say more concerning the policy of congress than that such policy favors the growth, development and improvement of the territory over which it has jurisdiction. Its acts concerning irrigation and the use of water upon arid lands have been enacted with the expectation that they would thereby assist in the development and growth of the territory where they were applicable. But it cannot be conceived that congress would attempt to build up one part of the United States when, by so doing, it would destroy and render worthless another part which is naturally much more valuable, and is already thickly populated and in a high state of cultivation. It is also highly proper, from legal and economical standpoints, that the waters of flowing streams should be appropriated for irrigation purposes in arid countries. The rules of the common law, that water may be first used for domestic purposes, and can only be used for irrigation purposes after all riparian domestic uses have been satisfied, are not applicable in a country where there can be no domestic use for water unless land is first irrigated and it is possible to support existence thereon. We are not, therefore, complaining that irrigation laws are wrong, nor are we complaining that congress is in error in fostering irrigation in those parts of the United States where the lands are worthless without such use of the water; but we do insist that it is contrary to the spirit of our government, to the rights of states in their relations with each other, contrary to justice, contrary to the doctrines of political economy and contrary to the doctrines of

common sense, that a great interstate river, rising and flowing for a long distance in and through an arid country, thence into another state, where it fertilizes a broad, beautiful and naturally fertile valley already in a high state of cultivation, should be destroyed in the state of its source and emptied upon lands which are worthless without it, although valuable with it, thereby destroying and making worthless the lower valley.

If Colorado can, by force of its own constitutional and statutory provisions, divert and appropriate the water of this stream, regardless of the effect upon states through which its valley runs, then any upper state may dam up and entirely shut off the flow of every interstate river rising in or flowing through its territory. This novel doctrine of state rights and state sovereignty would dissolve this nation into a collection of separate and selfish sovereignties. We submit that a defense which rests upon a theory so utterly subversive of every principle of American jurisprudence is inherently and fatally vicious.

SEC. 4. The March of the Common Law.

In its learned and comprehensive brief which the state of Colorado has filed in this case, it more than once challenges the existence of the common law in that portion of Colorado which constitutes the drainage basin of the Arkansas river. (Point 13, p. 61.)

If we seek to find what laws shall govern the present relations of the states of Colorado and Kansas, it is necessary to go back and see what system of jurisprudence came to the said states, whence it came, and what its origin was. It is proper for us, who claim

that the common law is the law which governs this case, to show its steady progress from the East to the summit of the Rocky mountains, which are the western barriers of the area to which we refer.

We will not stop at present to define the common law, but will leave its definition for a subsequent section, and will content ourselves for the present with the march of the common law through a vast area derived from England, Spain, and France.

It will be admitted that the jurisprudence of the original colonies was derived from the common law.

"At this time [1789] there were no states in the union the basis of whose jurisprudence was not essentially that of the *common law* in its widest meaning; and probably no states were contemplated in which it would not exist." (3 Pet. 433, 446.)

Let us now sketch the march of the common law.

SEC. 5. Creation of Indiana Territory.

After the adoption of the constitution of the United States, in which the common law was mentioned by name, and after the creation of the Northwest territory by ordinance of July 13, 1787 (1 S. L. 51), to which territory the common law extended, there was enacted by congress, May 7, 1800 (2 S. L. 58), a law erecting the territory of Indiana, which territory extended west to the Mississippi river. Indiana had been a part of the Northwest territory.

The legislative authority of Indiana territory was confided to a governor and three judges, all appointed.

The act provided for a legislature to be elected when there were "five thousand free male inhabitants" of voting age. (Nothing said about their being "white.")

The power of the governor and three judges to legislate was taken from the ordinance of 1787, and is as follows:

"The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original states, criminal and civil, as may be necessary and best suited to the circumstances of the district, . . . which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by congress." (1 S. L. 51.) . . .

Owing to the fact that the voting population of Indiana territory remained below the required number, its legislature for several years from the organization of the territory consisted of the governor, William Henry Harrison, afterwards President, and the three judges appointed to hold the courts of the territory. The seat of government was fixed by law at the village of Saint Vincennes, called by the English-speaking people Saint Vincent, under which name it was mentioned in the ordinance of 1787. The place was widely known by its English name, but the old French name of Vincennes persisted and was finally adopted.

SEC. 6. Legislation in Indiana Territory.

The first law passed by Indiana territory for its government was passed January 19, 1801.

It was signed by William Henry Harrison as governor, and by William Clark, Henry Vanderburgh and John Griffin as judges. It was a law requiring lists of persons and property in the territory, and was adopted from the code of Pennsylvania. It was done at the town of "Saint Vincennes." The Indiana lawgivers also passed "a law establishing courts of judicature"

at the same place, Vincennes, January 23, 1801. This law was also adopted from the Pennsylvania code. The governor and judges also passed laws concerning practice on appeals, which laws were taken from Kentucky and Virginia. These laws, although few and simple, were perhaps all that were necessary for the then sparsely settled country of Indiana territory.

The laws which Indiana territory adopted for its own use and guidance came from Pennsylvania, Virginia, and Kentucky, and assumed the common law to be in force. There was already an underlying, thin stratum of law from the Northwest territory passed by its general assembly, all of which, as far as applicable, assumed the common law to be in force. Hence the laws of procedure adopted by Indiana territory went on the hypothesis of the existence there of the common law. For instance, in the law of procedure for courts are such expressions as these:

"And the judges of the said court [a supreme court of record] and every of them, shall have power, when and as often as there may be occasion, to issue forthwith writs of *habeas corpus*, *certiorari*, and writs of error, and all remedial and other writs and process returnable to said court and grantable by the said judges by virtue of their office." (Sec. 8.)

"Every of said justices [of the common pleas] shall be and are hereby empowered to grant under the seal of their respective courts replevins, writs of partition, writs of view, and all other writs and processes upon the pleas and actions cognizable in the said respective courts as occasion may require." (Sec. 17.)

"And the said justices of the said respective courts last mentioned shall be and are hereby empowered to issue forth subpœnas, . . . under such pains and penalties as by the rules of the *common law* and course of the practice of the general court are usually appointed." (Sec. 18.)

The foregoing clauses are identically the same, word for word, both in the laws of Indiana territory, 1801, and in the laws passed by Indiana territory for the district of Louisiana October 1, 1804.

SEC. 7. Creation of District of Louisiana.

After the purchase of Louisiana territory, in 1803, and the taking possession of the same, the congress of the United States passed a law, March 26, 1804 (2 S. L. 283), subdividing the said territory upon the thirty-third degree of north latitude, running from the Mississippi river west, being the present southern line of Arkansas. The southern part of the said territory was called the territory of Orleans, and that portion north of the line was called the district of Louisiana. This act separating the two parts of Louisiana territory contained the provision that the governor and judges of Indiana territory might legislate for the new district, being the upper district (secs. 12 and 13), and the act also contained the following:

"SEC. 13. The laws in force in the said district of Louisiana at the commencement of this act, and not inconsistent with any of the provisions thereof, shall continue in force until altered, modified or repealed by the governor and judges of the Indiana territory as aforesaid."

We shall see that they were in fact afterwards altered, modified or repealed by being brought under the COMMON LAW.

SEC. 8. Legislation of District of Louisiana.

By virtue of the provisions of the act of March 26, 1804, it became necessary that the governor and judges of Indiana territory should legislate for the district of Louisiana.

In order to prevent confusion, it must be remembered that the northern part of the Louisiana purchase, so separated as stated, was first called the "District of Louisiana"; then the same territory was afterwards renamed the "Territory of Louisiana," and afterwards renamed the "Territory of Missouri"; so the same geographical boundaries in fact pertained to the three political divisions. As the said act of congress gave to Indiana territory the power to legislate for the district of Louisiana, the governor and judges of Indiana territory proceeded to enact such laws as they deemed necessary.

Although more than four years had elapsed since the organization of the territory of Louisiana, no legislature had yet been elected, and the territory was still governed by Mr. Harrison and three judges, and they had passed laws amounting in volume to about fifty pages; and when congress, in 1804, gave them the right to legislate for the district of Louisiana, the governor and judges of Indiana took most of the laws which they had adopted during the four years and, making only such changes as would necessarily fit them for the new territory, readopted them practically *verbatim* for the district of Louisiana. The laws were not passed separately and in detail, but were all passed at once in a body, as of the date of October 1, 1804, except one, a supplemental law regarding marriages, which passed April 24, 1805.

The formula by which these laws were passed was as follows, and we give a sample as representing all:

"A law establishing the office of sheriff.

Be It Enacted by the Governor and Judges of the Indiana Territory authorized and empowered by an Act of Congress to make laws for the District of Louisiana; and it is hereby enacted by the authority of the same:

First. That there shall be appointed and commissioned by the governor in each district a sheriff, (etc., etc.) . . . . . .

The foregoing is hereby declared to be a law for the District of Louisiana to take effect accordingly.

IN TESTIMONY WHEREOF, We, William Henry Harrison, governor, Thomas T. Davis, Henry Vander Burgh and John Griffin, judges in and over the Indiana Territory, have hereunto set our hands at Vincennes the first day of October, 1804, and of the independence of the United States the twenty-ninth.

(Signed) WILLIAM HENRY HARRISON,
THOMAS TERRY DAVIS,
HENRY VANDER BURGH,
JOHN GRIFFIN."

Therefore, the first laws of the district of Louisiana had the same allusions to the common law and the same adoption of its principles as were found in the laws of Indiana territory, because in that respect the laws were *verbatim* and identical; and they covered almost all of the territory now known as Kansas and eastern Colorado.

SEC. 9. Creation of Territory of Louisiana.

Upon March 3, 1805, the congress of the United States (2 S. L. 331) erected the territory of Louisiana from the former district of Louisiana, and, compliant with the theory of territorial government which had prevailed for many years, beginning with the ordinance of 1787, it enacted that the legislative power of the new territory should be vested in a governor and three

judges. The last law that was passed by the Indiana legislature concerning marriages, April 24, 1805, was perhaps invalid; but, as news of the creation of the territory of Louisiana had not reached Vincennes in time, the law was passed in ignorance of the fact, and it was afterwards borne upon the statutes of Missouri as a valid law; but no other law was passed by Indiana for the trans-Mississippi territory.

The territory of Louisiana did not succeed in organizing itself and getting its legislative machinery in operation until a year later. The first law of the territory of Louisiana was concerning the appointment of an attorney-general, dated May 6, 1806. It was enacted by the governor and judges of the territory of Louisiana in the same manner that laws had been enacted in Indiana, there being as yet no legislature, or rather, the governor and judges were in fact the legislature.

The act of congress (1805) above referred to contained a clause preserving the laws which Indiana territory had made for the district:

"SEC. 9. And be it further enacted, that the laws and regulations in force in the said district at the commencement of this act and not inconsistent with the provisions thereof shall continue in force until altered, modified or repealed by the legislature." (2 S. L. 332.)

SEC. 10. Legislation.—Louisiana Territory.

On July 3, 1807, an entire code of procedure under regular common-law style was adopted by the governor and judges of Louisiana territory, at St. Louis, and the act provided, among other things:

"The rules of the *common law* respecting evidence as

adopted by the courts of the United States having *common-law* jurisdiction shall govern the decisions of the courts of this territory in like cases."

After this a large number of territorial laws were passed prior to 1812, all of them on common-law theories, and one of them giving power (October 26, 1810) to the general court to establish separate rules for chancery practice. The act says:

"First, in all cases where a remedy cannot be had in the ordinary course of the *common-law* proceeding, the general court shall exercise a chancery jurisdiction, and the complainant may," etc., etc.

The territory of Illinois had been created February 3, 1809 (2 S. L. 514), and the city of St. Louis incorporated November 9, 1809. (Act La. Terr., June 18, 1809.)

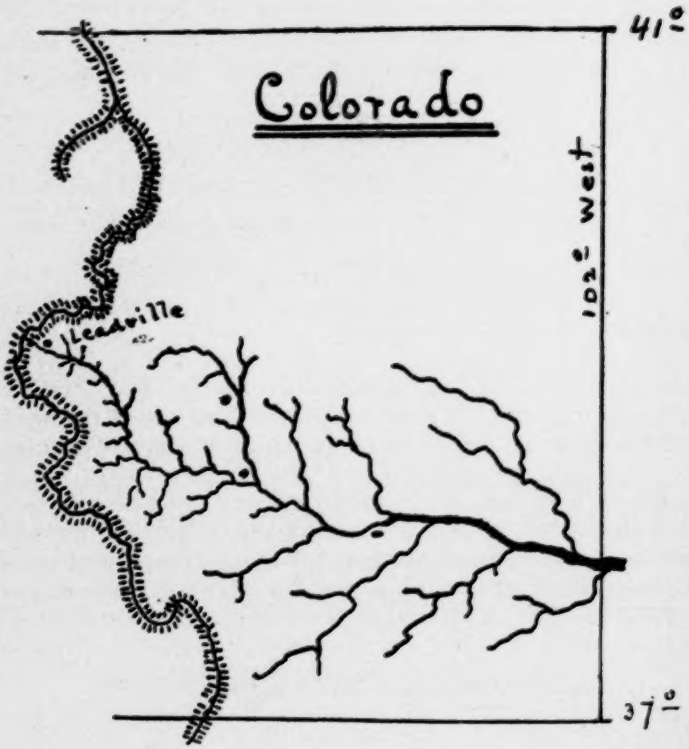
SEC. 11. Creation of Missouri Territory.

The United States congress, by law of June 4, 1812, (2 S. L. 743), changed the name of the territory of Louisiana to that of the territory of Missouri without any change of area, and, in section 14 of the act, provided for trials at common law, and, in section 15, made navigable waters forever free. Thereupon the territory of Missouri, which included most of Kansas and Colorado to the summit of the Rocky mountains, began to legislate.

The territory of Missouri included a large part of the drainage basin of the Arkansas river. The Spanish empire, extending from the south, came to the Arkansas river at about the point where Dodge City, Kan., is now situated, and extended along the middle thread of the river to the summit of the Rocky mountains, northwest

of Leadville, Colo., but all of that territory north of the middle thread of the river, and all of that south of the river from near Dodge City east, belonged to the territory of Missouri.

A map showing eastern Colorado, the Arkansas river and the summit of the Rocky mountains is submitted herewith:



SEC. 12. Legislation.—Missouri Territory.

The first law enacted by the general assembly of the territory of Missouri was one establishing weights and measures, dated July 28, 1813. On January 12, 1814, the legislature passed a law concerning the *posse comitatus:*

"1st. In all cases where by common law or the statute of this territory any ministerial or other officer is authorized or directed to execute any process, he shall be authorized, if necessary, to call to his aid all free white male inhabitants," etc., etc.

On January 4, 1815, courts were established in every county of the territory "except the county of Arkansas."

On January 19, 1816, there was passed by the legislature of the territory of Missouri the following:

"A law declaring what laws shall be in force in this territory. Be it enacted, etc.:

"1st. *The common law of England* which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the First, and of a general nature and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to nor inconsistent with the constitution and laws of the United States, shall be the rule of decision in this territory until altered or repealed by the legislature, *any law, usage or custom to the contrary notwithstanding.*"

Immediately following this, congress, on April 29, 1816, passed an act concerning the courts of the territory of Missouri (3 S. L. 328), saying that the said courts "shall possess and exercise chancery powers as well as *common-law* jurisdiction in all civil cases."

These acts of congress and of the legislature com-

pleted the entire effacement of the civil law, if any existed up to that date, in the area known as "Missouri territory."

SEC. 13. Missouri Common-law Decisions.

Concerning the interpretation given to the common law by the state of Missouri, it is but necessary to cite two cases from its supreme court:

"The statute of this state . . . declares that 'the common law of England . . . shall be the rule of action and decision in this state, any law, custom or usage to the contrary notwithstanding.' This statutory obligation and duty has been recognized and enforced, as we have seen, in all the earlier and later adjudications of this court on this subject." (Abbott v. Railway Co., 83 Mo. 271, 285.)

"The plaintiff was the possessor of certain riparian rights. *These rights were property.* Of that property he could not be deprived without just compensation, nor could the state itself either exercise such a power of deprivation or confer it upon some subordinate municipality dissevered from the constitutional condition of compensation for the property taken. And the destruction of the property right was a taking, within the meaning of the constitution." (Myers v. City, 82 Mo. 367, 378.)

SEC. 14. Boundaries.—Missouri Territory.

What were the boundaries, we now ask, of the territory of Missouri to which the common law of the territory of Missouri by statute applied? Upon an examination of the books, we find that it included almost all of Kansas and of eastern Colorado. The southwestern boundaries of the territory of Missouri were, for a while, shadowy, but finally there was a treaty made between the United States and Mexico, signed January 12,

1828, in which treaty the boundaries were exactly defined. (8 S. L. 372.) By article 2 of the said treaty, the boundary line between the United States and Mexico was fixed, as follows:

"The boundary line between the two countries, west of the Mississippi, shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo of Natchitoches, or Red river; then, following the course of the Rio Roxo westward, to the degree of longitude 100 west from London and 23 from Washington; then, crossing the said Red river, and running thence by a line due north, to the river Arkansas; thence, following the course of the southern bank of the Arkansas to its source, in latitude 42 north; and thence, by that parallel of latitude, to the South sea, the whole being as laid down in Melish's map of the United States, published at Philadephia, improved to the first of January, 1818. But if the source of the Arkansas river shall be found to fall north or south of latitude 42, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude 42, and thence along the said parallel to the South sea." (8 S. L. 374.)

In other words, the line came north to the Arkansas river, striking near Dodge City, Kan.; thence following the middle thread to the summit, near Leadville; thence north to the forty-second degree.

SEC. 15. Texas and the Common Law.

Turning now, let us note the invasion of the common law from the South.

The immigration into Texas brought a quick conflict between the Anglo-Saxon and the Latin-American. Trouble increased, and then the question of independ-

ence was agitated. The first declaration of Texan independence was on October 17, 1835. A provisional constitution for Texas was signed on November 13, 1835, and article 6 of that provisional constitution contained, among its provisions concerning courts, the following:

"ART. 6. Every judge so nominated and commissioned shall have jurisdiction over all crimes and misdemeanors recognized and known to *the common law of England.*" (2 C. & C. 1747.)

Upon March 2, 1836, there was another declaration of Texan independence; and upon March 17, 1836, there was adopted a constitution for the republic of Texas, and in the thirteenth section of article 4 is the following:

"The [Texas] congress shall, as early as practicable, introduce by statute *the common law of England*, with such modifications as our circumstances in their judgment may require, and in all criminal cases the common law shall be the rule of decision." (2 C. & C. 1757.)

Afterwards the congress of the republic of Texas met and passed a number of acts, among which was the following concerning the organization of courts, passed December 20, 1836:

"SEC. 41. *The common law of England* as now practiced and understood shall, in its application to juries and to evidence, be followed and practiced by the courts of this republic so far as the same may not be inconsistent with this act or any other law passed by congress." (1 Sayles, 222.)

Thereafter the congress of the republic of Texas met, and upon January 29, 1840, it passed "An act to adopt *the common law of England*, to repeal certain Mexican laws, and to regulate the marital rights of parties."

"Be it enacted, etc.: That *the common law of England*, so far as it is not inconsistent with the constitution or the acts of [the Texan] congress now in force, shall, together with such acts, be the rule of decision in this republic, and shall continue in full force until altered or repealed by congress." (1 Sayles, art. 707.)

The above law was decided (in Sparks v. Spence, 40 Tex. 693, 701) to have taken effect from and after March 16, 1840.

Upon February 5, 1840, the Texas congress passed an act to regulate proceedings in civil suits, as follows:

"Be it enacted, etc.: That the adoption of the *common law* shall not be construed to adopt the *common-law* system of pleading, but the proceedings in all civil suits shall, as heretofore, be conducted by petition and answer, but neither petition nor answer shall be necessary in a cause to recover money before a justice of the peace." (1 Sayles, art. 730.)

It will thus be noticed that the adoption of the common law was not by any indefinite terms made to depend upon the condition or wants of society. It was adopted *in toto*, and then when anything was to be subtracted from it, it was done by a special act of congress.

SEC. 16. Texas Common-law Decisions.

Let us now see what the courts of Texas have said upon the subject. How do they construe the adoption of the common law? We must look to the courts to find out what the people of Texas tried to do when, as a republic, they introduced the common law. We do not, indeed, have decisions of that period upon the question of riparian rights. The history of the Texas republic was quite brief, but the same people remained in Texas,

and there was handed down by custom and tradition and by the decisions of courts what the people of Texas understood to be the common law, and from subsequent cases we derive an opinion as to what the republic of Texas did or tried to do.

In The Indorsement Cases, 31 Tex. 693, 697, is the following:

"In the adjudication of cases, the ante-statute law of England forms the substratum, and the constitution and laws of the United States, together with the constitution and laws of this state, the superstructure of our system of jurisprudence."

Before that time there had been decided the case of Rhodes v. Whitehead, 27 Tex. 304; and shortly afterwards there was decided the case of Fleming v. Davis, 37 Tex. 173, extracts from which are as follows:

SEC. 17. Texas, Rhodes v. Whitehead.

"Generally speaking, every riparian proprietor is entitled to the land to the middle of the stream. As the owner of the land, he has *prima facie* the right to the use of the water flowing over it, in its natural current, without diminution or obstruction.

"He has this right, however, only in common with every other proprietor; but none of them has a property in the water itself; each of them may simply use it while it passes along. There is, with reference to it, a perfect equality of rights among all the proprietors; it is a thing common to all; the consequence is, that no one of them can use it to the prejudice of another.

"The water-power to which the riparian owner is entitled, consists in the fall of the stream when in its natural state, as it passes through his land or along the boundary of it; or, in other words, it consists in the difference of the level between the surface where the stream first touches his land and the surface where it leaves his land.

"'*Aqua currit et debet currere ut currere solebat*' *is a maxim no less of the civil than of the common law.*

"The appropriation of water for natural uses, such as for the use of people and cattle, and for household purposes, which must be absolutely supplied, can afford no ground of complaint by the lower proprietors, even if it were entirely consumed." (Rhodes v. Whitehead, 27 Tex. 304.)

SEC. 18. Texas, Fleming v. Davis.

"Irrigation of land, however beneficial in some portions of this state, is not one of the natural wants which will justify the owner of a head spring in exhausting the water which flows from it, to the injury of proprietors lower down on the natural channel of the stream. The maxim *sic utere tuo ut alienum non lædas* applies. The case of Tolle v. Correth, 31 Tex. 362, is not understood to have decided a contrary doctrine."

"In the distribution of the water of a natural stream among the riparian proprietors, the principles of the *common law* furnish the only rules judicially known in this state; and a suit, it seems, cannot be sustained to partition a natural stream among riparian proprietors, by allowing to each a specified time to appropriate its waters." (173.)

"It may not be improper, as the honorable legislature is now in session, that we call attention to the subject-matter of this suit; that if, in the wisdom of that body, legislation be required to adapt the law to the peculiar wants of any portion of our state, appropriate action may be had at an early day." (201.)

This was decided in 1873, and it is worthy of remark that the next Texas legislature, acting on the suggestion, did pass its first irrigation law March 10, 1875. (Sayles, art. 4076.)

SEC. 19. Boundaries of Texas.

The common law having thus been introduced into the republic of Texas, let us now inquire over what territory that law prevailed. We have seen, in section 14 hereof, that the United States and Mexico had decided upon a common boundary, and that the south bank of the Arkansas river from Dodge City to Leadville belonged to Mexico. We have also seen that the territory of Texas seceded from Mexico and established a republic, and became a part of the United States. What then was the boundary of Texas?

By reference to the laws enacted by the republic of Texas, we find that on December 19, 1836, the following law was enacted by the congress of Texas:

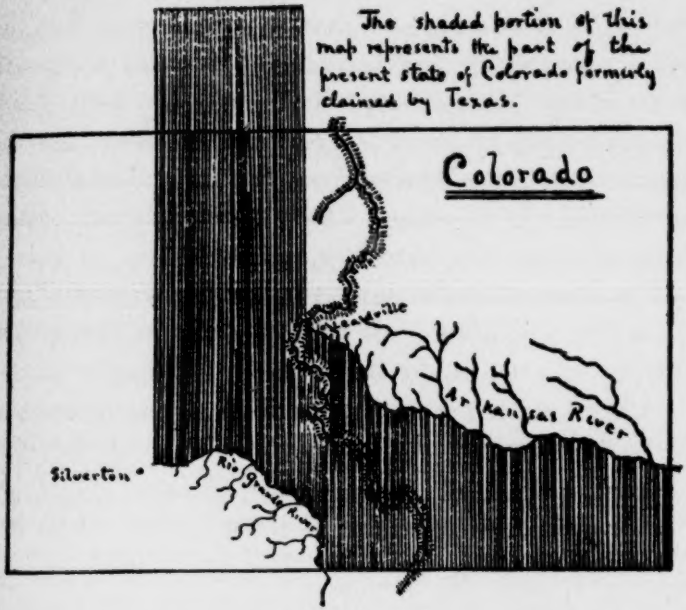
"Be it enacted, that from and after the passage of this act the civil and political jurisdiction of this republic be and it is hereby declared to extend to the following boundaries, to wit: Beginning at the mouth of the Sabine river and running west along the Gulf of Mexico three leagues from land to the mouth of the Rio Grande; thence up the principal stream of said river to its source; thence due north to the forty-second degree of north latitude; thence along the boundary line as defined in the treaty between the United States and Spain to the beginning." (1 Sayles, 216.)

An examination of the map shows that the foregoing boundary includes every acre of the drainage basin of the Arkansas river in Colorado not covered by the former territory of Missouri.

Thereafter there was a treaty between the republic of Texas and the United States, and the old boundary line established between the United States and Mexico Jan-

uary 12, 1828, was ratified and confirmed by Texas April 25, 1838. (8 S. L. 511.)

The map that follows here shows the Texas boundaries in what is now Colorado.


The shaded portion of this map represents the part of the present state of Colorado formerly claimed by Texas.
Colorado
Arkansas River
Silverton
Rio Grande River

SEC. 20. Missouri and "Indian Country."

Therefore, we can say that all of Kansas and the eastearn part of Colorado, from the summit of the Rocky mountains east, which forms the drainage basin of the Arkansas river, was included either in the territory of Missouri or in the republic of Texas, and this by proper and solemn treaties and ratifications.

Having established the fact that the common law was spread over the said area—first, over the Missouri part, by the common-law act of the territory of Missouri of

January 19, 1816; and second, over the Texas part, by the common-law act of the republic of Texas, taking effect March 16, 1840—let us now trace the subsequent history of the drainage basin of the Arkansas.

Upon March 6, 1820, there was an act of congress (3 S. L. 545) offering admission to Missouri as a state. Upon July 19, 1820, a convention called in the state of Missouri accepted the offer. Upon March 2, 1821, there was a joint resolution of congress admitting the state of Missouri into the union. (3 S. L. 645.) When Missouri became a state and was segregated from the great mass of territory of which it was at first a component part, territorial laws remained where they were put, and the subsequent laws of the state of Missouri, being confined to the state, and being therefore local in their operation within the state, are not necessary to be further examined, except to say that the common-law doctrine of riparian rights continues there until this day.

Afterwards, by an act of congress passed June 30, 1834 (4 S. L. 729), the Louisiana part of Kansas and Colorado was included in that which was, in the said act, designated as "Indian country."

SEC. 21. Cession from Texas to the United States.

In 1850, there being some discussion as to the carving out of new states and territories from the "Indian country," and it being desired that Texas should relinquish a part of her northern possessions, an act of congress was passed, September 9, 1850 (9 S. L. 446), by which the boundaries of Texas were moved south, as follows:

"*First.* The state of Texas will agree that her

boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the Gulf of Mexico.

"*Second.* The state of Texas cedes to the United States all her claim to territory *exterior to the limits and boundaries* which she agrees to establish by the first article of this agreement.

"*Third.* The state of Texas relinquishes all claim upon the United States for liability of the debts of Texas, and for compensation or indemnity for the surrender to the United States of her ships, forts, arsenals, custom-houses, custom-house revenue, arms and munitions of war, and public buildings with their sites, which became the property of the United States at the time of the annexation.

"*Fourth.* The United States, in consideration of said establishment of boundaries, cession of claim to territory, and relinquishment of claims, will pay to the state of Texas the sum of *ten millions of dollars* in a stock bearing five per cent. interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States."

SEC. 22. Creation of Kansas Territory.

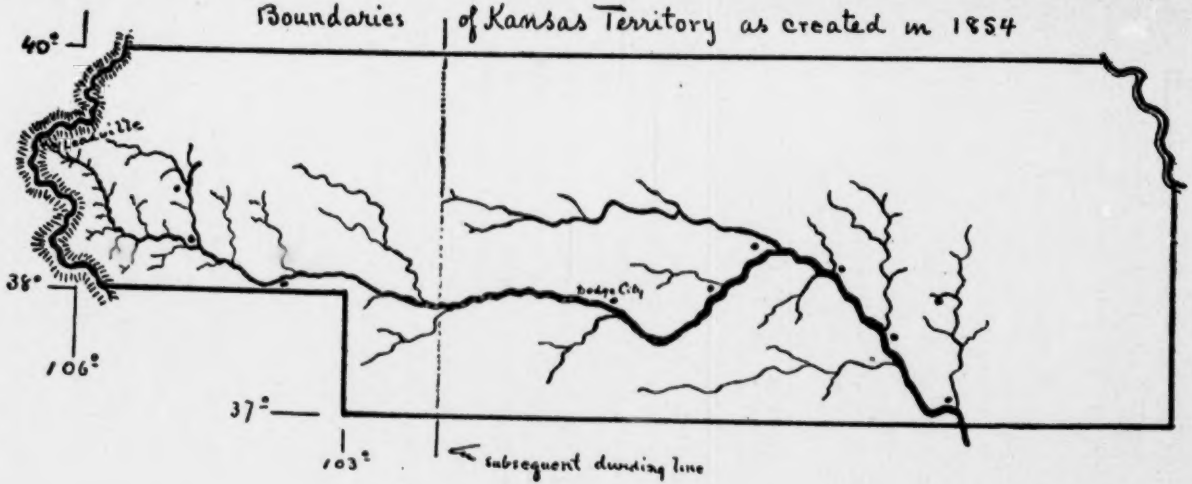
Therefore, Texas having ceded to the United States all of Kansas and Colorado lying south of the Arkansas river from Dodge City to Leadville, thereupon the territory became in 1850 part of the "Indian country," and the subject of much political discussion. Scarcely had the cession from Texas been effected than plans for the erection of a state were made, and after several

years of discussion an organic act was adopted, May 30, 1854, creating the territory of Kansas. (10 S. L. 283.)

By section 19 of the said organic act the territory of Kansas was created, extending from the Missouri river to the summit of the Rocky mountains. The official boundaries so established were as follows:

"SEC. 19. And be it further enacted, that all that part of the territory of the United States included within the following limits, except such portions thereof as are hereinafter expressly exempted from the operations of this act, to wit, beginning at a point on the western boundary of the state of Missouri where the thirty-seventh parallel of north latitude crosses the same; thence west on said parallel to the eastern boundary of New Mexico; thence north on said boundary to latitude 38; thence following said boundary westward to the east boundary of the territory of Utah, on the summit of the Rocky mountains; thence northward on said summit to the fortieth parallel of latitude; thence east on said parallel to the western boundary of the state of Missouri; thence south with the western boundary of said state to the place of beginning, be and the same is hereby created into a temporary government by the name of the territory of Kansas."

We append hereto a map (printed on next page) of the territory of Kansas as created by the said act.


Boundaries of Kansas Territory as created in 1854
40°
38°
106°
37°
103°
Dodge City
subsequent bending line

SEC. 23. Formation of Arapahoe County.

After the organization of the territory of Kansas, comprising as it did the main stem of the Arkansas river and most of its drainage basin, the territorial legislature divided the territory into counties, and the greater part of eastern Colorado was organized into the county of Arapahoe. The said legislation concerning Arapahoe county was as follows (Laws 1855, p. 217):

"CHAPTER 37.

"COUNTY OF ARAPAHOE.

"AN ACT to organize the county of Arapahoe in the territory of Kansas, and to define the boundaries thereof.

"*Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas, as follows:*

"SECTION 1. All that part of the territory of Kansas, described within the following limits, to wit: Beginning at the northeast corner of New Mexico, running from thence north to the south line of Nebraska and north line of Kansas; thence along said line to the east line of Utah territory; thence along said line between Utah and Kansas territories to where said line strikes New Mexico; thence along the line between said New Mexico and the territory of Kansas to the place of beginning, shall be and is hereby declared to constitute a county, to be known as Arapahoe county.

"SEC. 2. Allen P. Tibbitts is hereby appointed judge of the probate court of Arapahoe county. Said court to be held at such place in said county as the said judge shall deem best for the interest of the citizens of said county; provided, always, that the place designated as the county-seat shall be one place of holding said court, at which place shall be kept the records of said court, where all official business shall be transacted in vacation.

"SEC. 3. All county officers shall hold their offices at said county-seat.

"SEC. 4. The said judge of probate shall have power to appoint such officers of the county as are specified in this act but not appointed, and justify the same; all

such appointments made by judge of probate shall be entered of record.

"SEC. 5. The judge of probate shall not be ineligible to fill any other office in the county, not conflicting with the duties of probate judge.

"SEC. 6. Allen P. Tibbitts, Levi Mitchell and Jonathan Atwood are hereby appointed commissioners to locate the county-seat; said county-seat to be known by the name of Mountain City; said commissioners so appointed shall be and constitute the board of county commissioners to transact county business.

"SEC. 7. James Stringfellow is hereby appointed clerk of the county or probate court, who, by virtue of his office, shall be *ex officio* recorder.

"SEC. 8. The said judge of probate shall have full power to appoint a justice or justices of the peace within and for said county, who shall hold his or their offices at the place designated by said judge.

"SEC. 9. There shall be appointed by said judge one sheriff, one treasurer (who shall be *ex officio* assessor), and one surveyor.

"SEC. 10. All persons appointed under the provisions of this act shall hold their offices until the first general election thereafter, at which time said offices shall be filled by elections.

"This act to take effect and be in force from and after its passage [which was November 1, 1855]."

Arapahoe county, Kansas, still exists as Arapahoe county, Colorado. The county is shrunken in area, but contains the state capital, Denver.

SEC. 24. Kansas Adopts Common Law.

After the enactment of the law concerning Arapahoe county, the legislature of Kansas territory adopted the common law of England, in terms as follows (Laws 1855, p. 469):

"CHAPTER 96.

"LAW—COMMON.

"AN ACT adopting the common law as the rule of action in this territory.

"*Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas, as follows:*

"SECTION 1. *The common law of England* and all statutes and acts of parliament made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom, and not repugnant to or inconsistent with the constitution of the United States and the act entitled 'An act to organize the territory of Nebraska and Kansas,' or any statute law which may from time to time be made or passed by this or any subsequent legislative assembly of the territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding.

"SEC. 2. Punishment by virtue of the common law shall in nowise be other than fine and imprisonment, and such fine shall not exceed one hundred dollars, and such imprisonment shall not exceed six months; nor shall any of the British statutes for the punishment of crimes and misdemeanors be in force in this territory.

"This act to take effect and be in force from and after its passage [which was November 1, 1855]."

This act was referred to as an existing law of the state in Sattig v. Small, 1 Kan. 170.

SEC. 25. Kansas Reenacts the Common Law.

Fearing that the act of 1855 might not be sufficiently declarative, or supposing that no evil might result from a reenactment, the legislature of Kansas territory, in 1859, reenacted the common law, as follows (Laws 1859, p. 615):

"AN ACT adopting the common law as the rule of action in this territory, and regulating the authentication of statutes and the taking effect thereof.

"*Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas:*

"SECTION 1. *The common law of England* and all stat-

utes and acts of parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom, and not repugnant to or inconsistent with the constitution of the United States and the act entitled 'An act to organize the territory of Nebraska and Kansas,' or any statute law which may from time to time be made or passed by this or any subsequent legislative assembly of the territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding.

"SEC. 2. Punishment, by virtue of the common law shall in no wise be other than fine and imprisonment, and such fine shall not exceed one hundred dollars, and such imprisonment shall not exceed six months; nor shall any of the British statutes for the punishment o crimes and misdemeanors be in force in this territory.

"Approved February 11, 1859."

SEC. 26. Arapahoe County Representation.

Thereafter an election was held in Kansas, October 6, 1856, to choose a delegate to congress. Arapahoe county cast seven votes, which were duly counted in the returns of Kansas territory. (Andr. Hist. Kan. 154.)

The Kansas legislature in 1857 incorporated the Missouri River & Rocky Mountain Railroad Company.

In the summer of 1858 gold was discovered in Colorado, and in October of that year a definite organization was made of Arapahoe county, with a center at or near Denver, and a full list of officers selected and a delegate chosen to attend the Kansas legislature.

In 1859 the Kansas legislature met, and A. J. Smith appeared as the delegate from Arapahoe county, and the legislature of 1859, recognizing Arapahoe county, and its geographical organization in 1855, and its subsequent political and official organization by Gov-

ernor Denver in 1858, made it a representative district, and it became the Twenty-seventh representative district of Kansas. (Laws 1859, pp. 48, 50.) There was much sentiment in Colorado at the time in favor of a separate territorial organization, which sentiment afterwards grew into a reality through the increase of wealth and population.

In 1859 the people of Arapahoe county, Kansas, elected and sent to the Kansas legislature Mr. Richard Sopris. He had held several minor offices; he had been mayor of the growing city of Denver; he was afterwards captain of company C, First Colorado cavalry; and after the war, sheriff of Arapahoe county, Colorado. He was a man of great activity and great popularity.

Three cities had been recognized as a nucleus of the control of Arapahoe county and the adjacent territory. One of them was called Auraria, which now might be called West Denver. Another was called Highland, which might now be called North Denver. The third city was named Denver. There was no more active man in the Kansas legislature than Captain Sopris. There was a no more favored spot in Kansas than was Arapahoe county. It was practically outside of the turmoil of party politics.

SEC. 27. Arapahoe County Legislation.

To show the extent to which Arapahoe county came under the influence and terms of Kansas legislation, we recapitulate the acts of the legislature which Captain Sopris introduced and had passed, or which he fought for and exerted himself in passing.

First, an act of fifty-three sections:

"AN ACT to incorporate and establish the city of Denver, Kansas territory.

"*Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas:*

"SECTION 1. That all that portion of land lying east of Cherry creek and south of the Platte river, surveyed and platted by James Lowry and others, and known as Denver City, in Arapahoe county, Kansas territory, together with the freeholders and inhabitants residing thereon, shall constitute a body corporate by the name of, and be known as, the city of Denver," etc. (Laws 1860, p. 86.)

This was followed by another act:

"AN ACT to consolidate the cities of Auraria, Denver, and Highland.

"*Be it enacted by the Governor and Legislative Assembly of the Territory of Kansas:*

"SECTION 1. That an election shall be held in the cities of Auraria, Denver, and Highland, in Arapahoe county, Kansas territory, on the first Monday in June, 1860, for the purpose of ascertaining the sense of the inhabitants of said cities in regard to consolidating all three of them under one common name and one common municipal government," etc. "Approved February 27, 1860." (1860, p. 72.)

Then an act to establish the Atchison & Denver City Telegraph Company, in which Captain Sopris and John James Ingalls were each, respectively, interested. (1860, p. 428.)

Then an act to incorporate the Arapahoe County Gas and Light Company. This passed contemporaneous with the Atchison City Gas Light Company. (1860, p. 291.) Captain Sopris was one of the incorporators o the Arapahoe County Gas Light Company.

Then Captain Sopris had the Sopris Town Company and the Arazo Town Company, both of Arapahoe

county, incorporated, in each of which he was an incorporator. (1860, pp. 49, 212.)

Then Captain Sopris had incorporated, with himself as a charter member, two other corporations: one, the Capital Hydraulic Company; and the other, the Arapahoe County Improvement Association. (1860, pp. 362, 363.)

Then Captain Sopris had seven different mining companies incorporated, in which he was a charter member, to operate in Arapahoe county.

The legislation of and concerning Arapahoe county passed in that legislature, by and with the consent and advice of Captain Sopris, its representative, in volume and importance, far outrivals the legislation pertaining to any other county in Kansas territory. It is all found in the laws of Kansas territory of the year 1860.

SEC. 28. Admission of Kansas.

Upon January 29, 1861, Kansas was admitted into the union (12 S. L. 126), and in the act of admission are the following words:

"*Be it enacted*," etc.:

"SECTION 1. That the state of Kansas shall be and is hereby declared to be one of the United States of America and admitted into the union on an equal footing with the original states *in all respects whatever*."

On February 28, 1861, Arapahoe county became a part of Colorado territory, that day organized. (12 S. L. 172, 700.)

SEC. 29. Recapitulation.—Common Law.

It is well that the four common-law enactments be grouped, so that they may be studied together. They are as follows:

Missouri territory, January 19, 1816 (sec. 12 hereof).

"The common law of England which is of a general nature, and all statutes made by the British parliament in aid of or to supply the defects of the said common law, made prior to the fourth year of James the First, and of a general nature and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to nor inconsistent with the constitution and laws of the United States, shall be the rule of decision in this territory until altered or repealed by the legislature, *any law, usage or custom to the contrary notwithstanding.*"

Republic of Texas, March 16, 1840 (sec. 15 hereof).

"That the common law of England, so far as it is not inconsistent with the constitution or the acts of [the Texan] congress now in force, shall, together with such acts, be the rule of decision in this republic, and shall continue in full force until altered or repealed by congress."

Territory of Kansas, November 1, 1855 (sec. 24 hereof).

"The common law of England and all statutes and acts of parliament made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom, and not repugnant to or inconsistent with the constitution of the United States and the act entitled 'An act to organize the territory of Nebraska and Kansas,' or any statute law which may from time to time be made or passed by this or any subsequent legislative assembly of the territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding."

Territory of Kansas, February 11, 1859 (sec. 25, hereof).

"The common law of England and all statutes and acts of parliament in aid thereof, made prior to the fourth year of James the First, and which are of a general nature, not local to that kingdom, and not repugnant to or inconsistent with the constitution of the United States and the act entitled 'An act to organize the territory of Nebraska and Kansas,' or any statute law which may from time to time be made or passed by this or any subsequent legislative assembly of the territory of Kansas, shall be the rule of action and decision in this territory, any law, custom or usage to the contrary notwithstanding."

It will thus be seen that on January 29, 1861, Kansas was admitted into the union upon an equal footing in every respect with the other states of the union, and that there were upon its soil three strata of common law, viz., one upon the Missouri portion, one upon the Texas portion, which together made the first stratum. The next was the Kansas territorial law of 1855, which made the second stratum. The next was the Kansas territorial law of 1859, which made the third stratum.

This law not only covered Kansas, but it also covered the drainage basin of the Arkansas river in Colorado; and it will be noticed that in the adoption of the common law there was no reservation that it was modified in any way to meet the wants or conditions of the people, for the reason that the wants and conditions of the people were fulfilled by the common law in its full entirety. And there was no question as to riparian rights; neither had the United States at the time of the admission of Kansas adopted any law concerning irrigation or the reclaiming of arid lands; nor was there any decision of any federal court upon that subject; nor had any policy of the United States been intimated or declared contrary to the English doctrine of

riparian rights; nor had the Kansas legislature recognized irrigation or any theory of water use contrary to the English doctrine of riparian rights.

SEC. 30. Common Law.—Riparian Rights.

The general doctrine of riparian rights as known at the common law is not discussed in the brief of the defendant, and its operation upon this case is wholly denied. In view of our contention that the common law does apply, we think best to submit our views as to the nature of that doctrine and the extent of its operation.

The familiar definition of the common-law doctrine is what is known as Chancellor KENT's rule, and is as follows:

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua curret et debet currere* is the language of the law. Though he may use the water while it runs over his land he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate." (3 Kent, *439.)

"'Fresh rivers of whatsoever kind do of common right belong to the owners of the soil adjacent' is the expressive language of the common law and is of universal application." (Smith v. City of Rochester, 92 N. Y. 473.)

Riparian owners upon a stream have a common property in the flow of water therein, and neither persons nor legislatures have any greater right to interfere with

such flow than with any other species of property. (Chenango Bridge Co. v. Paige, 83 N. Y. 178; *Ex parte* Jennings, 6 Conn. 518.)

The rule is often stated that each riparian owner is entitled to the undiminished flow of the stream adjacent to his land, but so many modifications of the rule and exceptions thereto have been made that we do not believe we have a right to, and do not, claim that to be a correct statement of the law. It is difficult, if not impossible, to lay down any definite, abstract rule of law applicable to all cases, but the fundamental principle governing the decisions is found in the attempt to do justice to all alike. To compel the undiminished flow of all the water in a stream may, under some circumstances, work an injury to all the proprietors, while to give one more than his share is certain to injure others. In the case of Sandwich v. Great Northern R. Co., L. R. 10 Ch. Div. 707, the court said:

"A riparian proprietor has a right to make all the use he can of the stream, provided he does not abstract so much as prevents other people from having equal enjoyment with himself."

SEC. 31. Common Law.—Use Must be Reasonable.

The rights of riparian owners in a running stream above and below are equal; each has a right to the *reasonable* use and enjoyment of the water, and each has a right to the natural flow of the stream, subject to such disturbance and consequent inconvenience and annoyance as might result to him from a reasonable use of the waters by others. (Holden v. Winnipiseogee Lake Cotton & W. Mfg. Co., 53 N. H. 552.)

The right of a proprietor is not an absolute and ex-

clusive right to all the water flowing in the stream, but a right to the flow and enjoyment of the water, subject to similar rights of all the proprietors to a *reasonable* enjoyment of the stream. (Embrey v. Owen, 6 Exch. 353.)

The right of the riparian owner to the use of the water is subject to be limited by the like rights of other owners on the stream.

In determining what is a reasonable use of the water of a stream, regard must be had to the subject-matter of the use; the occasion and manner of its application; its object, extent, and necessity; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury caused by it to others; and all other circumstances bearing upon the fitness and propriety of the use under consideration. (Red River Rolling Mills v. Wright, 30 Minn. 249.)

The right to the use has been made to depend upon its reasonableness. If the principles of the common law are to be applied, there must be allowed to all, of that which is common, a reasonable use. (Union Mill & Min. Co. v. Dangberg, 81 Fed. 73.)

Every proprietor through whose land a watercourse runs has a right to a reasonable use of the water, whether for power to turn a mill, for watering stock, or to irrigate lands, provided he does not by his use materially damage any other proprietor above or below him. (Williamson v. Lock's Creek Canal Co., 78 N. C. 156.)

Any usage which inflicts positive, repeated and sensible injury upon a proprietor above or below is not to be

considered a reasonable usage. (Ells v. Clemens, 21 Ont. 227, affirmed in 22 Ont. 216.)

The true test as to the reasonable use of water by a riparian proprietor is whether the use works actual, material and substantial damage to the common right; not to an exclusive right to all the water in its natural state, but to the right which each proprietor has as limited and qualified by the precisely equal right of every other riparian proprietor. (Union Mill & Min. Co. v. Dangberg, 2 Sawy. 450.)

The question is, whether the use made by one of the water is reasonable and consistent with the corresponding use by the other. Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102.)

What is a reasonable use of the water for irrigation purposes is a question for the jury. (Heilbron v. Seventy-six Land and Water Co., 80 Cal. 189.)

Many cases might be cited which are more restrictive of the rights of riparian proprietors to use water, and doubtless some can be found which will go further in the other direction, but we believe the rules of decision here laid down will appeal to the court as being absolutely just.

At the common law, it was not permitted to use water for the irrigation of non-riparian lands. (Ormerod v. Todmorden Joint Stock Mill Co., L. R. 11 Q. B. Div. 155; Gould v. Eaton, 117 Cal. 539; Shamleffer v. Council Grove Peerless Mill Co., 18 Kan. 24.)

SEC. 32. The United States Land Grant of 1863.

When the state of Kansas was admitted into the union, at which time her rights became fixed, there was, as stated hereinbefore, no national legislation whatever

pertaining to irrigation; nor were there any decisions in the federal courts pertaining to irrigation. And while matters so stood and continued, the congress of the United States, by act of March 3, 1863 (12 S. L. 772), passed the following act:

"CHAPTER 98.

"AN ACT for a grant of lands to the state of Kansas in alternate sections, to aid in the construction of certain railroads and telegraphs in said state.

"*Be it enacted*," etc.:

"SECTION 1. That there be and is hereby granted to the state of Kansas for the purpose of aiding in the construction:

"*First*, [of the Leavenworth & Galveston road];

"*Second*, of a railroad from the city of Atchison, *via* Topeka, the capital of said state, to the western line of the state, in the direction of Fort Union and Santa Fe, N. M., . . . every alternate section of land designated by odd numbers, for ten sections in width on each side of said road and each of its branches. . . .

"SEC. 2. [Remaining land to be sold at double minimum prices.]

"SEC. 3. That the said lands hereby granted to said state shall be subject to the disposal of the legislature thereof for the purposes aforesaid and no other. . . .

"SEC. 4. That the lands hereby granted to said state shall be disposed of by said state only in the manner following, that is to say: [Here follows the method of certification.]

"SEC. 5. [Concerning transportation of mail on said railroad.]"

As to the character of the title which the foregoing grant and acceptance passed there can be no question. It was a fee-simple title. It was provided by an act of congress (August 3, 1854, ch. 201, 10 S. L. 346) that in all cases where land had been or should hereafter be granted by congress the fee-simple title should pass. Hence the grant passed the fee-simple title to the state of Kansas for a vast quantity of land.

The allegations of the bill in this suit show that the railroad to which this land grant passed ran up the Arkansas river. Courts will take judicial notice of the path of the trunks of large railroads the same as they will of large rivers. (72 Tex. 404; 56 Tenn. 873.) In short, courts will take judicial knowledge of what everybody knows.

The Atchison, Topeka & Santa Fe railroad runs up along the water-bed of the Arkansas river, and, by the grant of congress, half of the land in the valley on both sides of the water-bed passed to the state of Kansas in fee simple, and was by the state of Kansas conveyed afterwards to the railroad company, and deeded in after-years, and this land passed to the citizens of the state of Kansas by a fee-simple title which the United States could not thereafter rightfully limit, and which could not be bound thereafter by any subsequent acts of congress. The title to a large portion of these lands, as shown by the bill, remained in the state of Kansas until after 1874 and up to the year 1883.

SEC. 33. Acceptance by Kansas of Land Grant.

After the congressional grant made to the state of Kansas, above referred to, the said state, upon February 9, 1864, passed an act which is found in the General Statutes of the state (ch. 79, p. 149), of which the following is a synopsis:

"AN ACT to accept a grant of lands made to the state of Kansas by the congress of the United States to aid in the construction of certain railroads and telegraphs in said state, and to apply the same to construction of such roads and telegraphs.

"*Be it enacted*," etc.:

"SECTION 1. The state of Kansas hereby accepts the grant of lands made to this state by the congress of the

United States by act entitled 'An act for a grant of lands in the state of Kansas in alternate sections to aid the construction of certain railroads and telegraphs in said state,' approved March 3, 1863, upon the terms and conditions set forth in said act of congress.

"SEC. 2. [This section concerns the Leavenworth, Lawrence & Fort Gibson Railroad and Telegraph Company.]

"SEC. 3. In consideration that the Atchison, Topeka & Santa Fe Railroad Company (formerly the Atchison & Topeka Railroad Company) shall construct a railroad from the city of Atchison *via* Topeka to the western line of said state," etc., etc., . . . "the state of Kansas hereby agrees to grant, bargain and sell to said Atchison, Topeka & Santa Fe Railroad Company all that portion of the lands granted to this state by the above-named act of congress applicable to the construction of the hereinabove described railroad and branch thereof, and which shall be selected and located in conformity with the provisions of the above-named act of congress. . . .

"SEC. 4. [Companies to file copy of acceptance.]

"SEC. 5. [Companies to file map of lands and roads.]

"SEC. 6. [Right of way granted.]

"SEC. 7. [The act shall be published, and was published February 13, 1864.]"

In conformity to this act supplementing the act of congress, the land was patented. Owing to the direction and location of the track of the railroad, the said land grant took one-half of the land in the valley of the Arkansas river for 250 miles; but as the Arkansas river had been meandered, the survey lines did not cross the river, and that portion of the land which was in the water-bed of the river remained unsold, and never has been sold.

By the above land grant, one-half of the river valley became the property of the state of Kansas, and the amount so conveyed in the valley of the Arkansas river was over 1,500,000 acres.

SEC. 34. Tenure of United States Land in Kansas.

Therefore, the rights of Kansas when she was admitted into the union upon "an equal footing with the original states in all respects whatever" date from that time, January 29, 1861, and neither the United States nor the state of Colorado, nor any other prince, potentate, or power, can take away the rights of Kansas. Nor could Colorado, after the separation, overthrow the existing condition of things and proceed to deprive the state of Kansas of the property rights which the territory of Kansas had fixed. And Kansas had a vested right, so far as the land laws of the United States government were concerned, to insist that the public lands should not be handled in such a way as to injure the state of Kansas.

When the state of Kansas was organized the government owned land therein, and it also owned land in the state of Colorado; but the government was simply the holder of the title, the same as any other holder. The land which the government held in Kansas was held by it the same as if held by a private citizen. The government could not add to the land which it held in Kansas burdens to forever follow the land, contrary to the laws of Kansas or the will of its citizens. For instance, the United States could not burden the land with the right of primogeniture or with entails. It could not sell the land so as to take it out from under the control of local law. It simply had the right of disposal; the grantee to take the land and hold it thereafter subject to the existing laws of Kansas. The government, perhaps, if it saw fit, might, the same as a private individual, in-

sert in the deed a provision that liquor should never be be sold upon the piece of land conveyed; but it could not insert in the deed a clause that the grantee should hold the land in perpetuity, or that it should never be sold under execution for debt. In other words, the government had no political jurisdiction whatever, but held the land simply as a private owner, with certain restrictions that it was not to be taxed. The local government had control and jurisdiction over the land, as also concerning crimes committed thereon, and concerning the rights of parties, between themselves, who without title might occupy the land.

If the United States owned land outside of the state of Kansas, it could not so use that land as to injure any person in the state of Kansas who had acquired rights within the state, nor could the United States use any such outside land in such a way as to injure or limit the rights and jurisdiction of the state of Kansas within the state.

SEC. 35. What Are Navigable Rivers.

It is not vital to the complainant's case, but we wish at this point to submit a few considerations concerning the navigability of the Arkansas river.

The bill charges that the river empties into the Mississippi river at the eastern boundary of the state of Arkansas. "From Fort Gibson, in the Indian territory, to the mouth of said river, it is a large, navigable stream, and is used for the purpose of trade and commerce by vessels plying thereon." (3) Again: "The course of said river after leaving the mountains of Colorado proceeds in an easterly direction for, ap-

proximately, 200 miles, to the west line of Kansas, and the river in its course after leaving the mountains is a navigable stream under the laws and departmental rules and regulations of the United States."

It is not necessary to discuss the meaning of the word "navigable." We allege in our bill that the Arkansas river is a navigable river under the laws of the United States and under the rules and regulations of the department. This is admitted to be true by the defendant's demurrer, but denied in its brief.

When a river running through several states of this union is navigable in fact at its mouth, and through one state into another, why may not the whole river come under governmental control, and why may not the United States declare it navigable even to its very source? The river should be taken as a unit and should be legislated for and governed as a whole. To be well governed as to part, jurisdiction should be taken of the whole.

It is not a question whether a stream will at all points float logs, rafts, or poles; or whether it can be navigated by "canoes and pirogues"; or by "Durham boats"; or by steamboats like "The Daniel Ball" (10 Wall. 557), that draw two feet of water, more or less. The question is whether a river, being in fact navigable upon part of its length for equipments actually engaged in interstate commerce, may not be preserved in the entire length of its main stem. Formerly congress, in the acts cited in section 36 hereof, went even further than this, and, following the rivers past their sources, preserved and exercised jurisdiction over the land and portages beyond.

The government of the United States might not be able to declare a river navigable when no part of it was in fact navigable (for in that case the government would be assuming the functions of a lexicographer), but the government can class a river as navigable from mouth to source if in fact navigable between states at any point. The United States moved Indian tribes from Georgia to the Indian territory by steamboat; and supplied by river many Western posts and large areas of military and civil administration from Fort Gibson, on the Neosho river, a confluent of the Arkansas river, in the Indian territory.

The question came up before a Kansas jury whether or not the Arkansas river was navigable above the mouth of the Little Arkansas river, which flows in at Wichita. The jury found that the river was navigable in 1875 above that point, and it was conceded on the trial that the river was meandered in the survey, and the court treated the river as a navigable river. (Steinbuchel v. Lane, 59 Kan. 7.) The Kansas courts and legislatures have always assumed the right to declare what streams were or were not navigable in the state; such declarations being subject to federal control. (See Wood v. Fowler, 26 Kan. 682.)

A river through a portion of its course may be in fact unnavigable. This may occur from falls or rapids or natural obstacles; and yet if the river is in fact navigable through part of its course, the part in fact non-navigable may be officially navigable.

SEC. 36. Rights on Navigable Rivers.

By the terms of the ordinance of 1787, it was declared (1 S. L. 52):

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor."

Afterwards, on March 3, 1811, congress declared as follows (2 S. L. 666):

"SEC. 12. Be it enacted, etc.: That all the navigable rivers and waters in the territories of Orleans and Louisiana shall be and forever remain public highways."

Afterwards, on June 4, 1812, congress declared as follows (2 S. L. 747):

"SEC. 15. And be it further enacted: That . . . the Mississippi and Missouri rivers and the navigable waters flowing into them and the carrying places between the same, shall be common highways, and forever free to the people of the said territory and to the citizens of the United States, without any tax, duty or impost therefor."

The state of Kansas in its bill having charged that the Arkansas river in Kansas is a navigable stream under the laws of the United States and under the rules and regulations of the department, and that fact having been admitted by the demurrer, the state of Colorado in its argument now takes a position to the contrary. The state of Colorado now claims that the river in Kansas is not in fact navigable, and that this court will assume that the river is not navigable, and will take judicial

knowledge that it is not navigable, and will decide upon such judicial knowledge rather than on the pleadings.

If the court takes judicial notice of any of the facts concerning the river's navigability, it will take judicial notice that the United States declares the Arkansas river in Kansas to be a navigable river, and has always treated it so; and that the river is *officially navigable.*

The court will take judicial notice of the course of a river but not of the depth of the water. The court will not take judicial notice that it is in fact navigable or unnavigable in any distinct portion of Kansas.

The Rio Grande is 160 miles longer than the Arkansas river, but yet the court will not take judicial notice that the Rio Grande is unnavigable in New Mexico. In United States v. Rio Grande, D. & I. Co., 174 U. S. 690, this court distinctly repudiated the doctrine that the supreme court of New Mexico could take judicial notice of how far a navigable stream continued to be navigable and denied the right of said court to decide that question as to a river in its own territory.

One thing, however, would seem certain, that if the United States, in its appropriate department, declared and treated a river as navigable, a court would not rule to the contrary without pleadings and evidence in support thereof; that is, one branch of the government would not assume to know without an examination of the facts more about a matter than another branch of the government did which had examined the facts.

SEC. 37. Survey and Meander Lines.

Colorado claims that the Arkansas is not a navigable river.

Many streams are navigable only a part of the time. Many are navigable in fact, but yet not navigated. Most are navigable only a part of their course. Therefore, we must let the United States choose its own rule and settle each case as seems best, and if it does not care to sell land to the middle thread of the stream, then it may sell land to the margin or bank and retain future control of the bed as to interstate commerce. It is a matter for the United States in its original surveys to settle. As the United States owned the land along the Arkansas river originally, it had the right either to meander the stream and call the river navigable, or to survey across it and sell the stream bed as land, if it deemed the river to be in fact not navigable. We admit that the Arkansas river, having been deprived of all its water, is not now a navigated river in Kansas. It is, nevertheless, navigable in contemplation of law, because the United States has only sold the land on its banks to the margin of the stream. The bed of the river has never been sold by the United States to any person, and whether the river is legally, technically or theoretically navigable makes no difference. The river at one time had a defined water-bed, and over this bed the water did flow, and the United States did not sell the bed.

By pronouncing the river a navigable one, the United States reserved the bed of the river from survey, and in the survey it consequently meandered the lines along the bank of the river. This is not only true in fact but is admitted by the demurrer. The meandering of a

stream by government survey is well understood. In Railroad v. Schurmeir, 7 Wall. 272, 286, the court says:

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract but for the purpose of defining the sinuosities of the banks of the stream, and as the means for ascertaining the quantity of the land in the fraction subject to sale and which is to be paid for by the purchaser."

In La Plaisance v. Monroe, 1 Walker Ch. (Mich.) 155, 161, the court said (1843.):

"The beds of all meandered streams and navigable rivers belong to the state within which they lie.

"The bed of the stream is public property and belongs to the state. This is the case with all meandered streams, no part of them being included in the original survey."

This fact is recognized by the early statutes of Wisconsin.

"All rivers and streams of water in this state, in all places where they have been meandered and returned as navigable by the surveyors employed by the United States government, are hereby declared navigable to such an extent that no dam, bridge or other obstruction may be made in or over the same without permission of the legislature." 1850. (Wis. Rev. Stats., ch. 34, § 1.)

"It is further insisted by the counsel for the plaintiff in error that, inasmuch as the United States has not surveyed and sold the bed of this stream [the west branch of White river, Indiana], it still belongs to the United States and stands on the same foot that the other unsold lands stand on. . . . This position is not tenable." 1833. (Cox v. State, 3 Blackf. [Ind.] 8.)

"By the acts of congress regulating the survey and disposal of the public lands, the federal government has renounced the title to the navigable waters and the soil covered by them." 1839. (Mayor v. Eslava, 9 Porter, [Ala.] 577, 604.)

SEC. 38. Title to Soil under Navigable Rivers.

In the official government publication called "The Public Domain," page 1190, the surveyed area of Kansas is given, and the number of miles of land and water is given, and the publication says that Kansas has an area of 380 square miles of water in rivers and streams. The said publication showing the amount of water in Kansas includes only the beds of the meandered rivers, and principally the bed of the Arkansas river, which has an area of over 100 square miles. This causes us to consider the ownership of the title and soil in the beds of rivers.

When the government meanders a stream and sells the adjoining land and treats the stream as if it were navigable, or treats an unnavigable part of a navigable river as if it were navigable, then the title to the soil of the water-bed of that stream between the two meandered side lines vests in the state. This has been decided so often that there is no controversy upon the subject.

Shively v. Bowlby, 152 U. S. 1.
Illinois Central v. State, 146 id. 387.
Packer v. Bird, 137 id. 661.
Martin v. Waddell, 16 Pet. (U. S.) 367.
Pollard v Hagan, 3 How. (U. S.) 212.
Richardson v. United States, 100 Fed. 714.

In Mississippi v. Ward, 2 Black (U. S.) 485, the court considered the measurement of a stream to see in which state a pier stood, so as to fix jurisdiction.

The doctrine now is that the soil under all navigable rivers, lakes and waters belongs to the states, and is under their sovereignty and domain, in trust for the

people and the public, subject to no disturbance whatever except the right of congress to legislate for the benefit of commerce between the states.

Congress is restricted in its legislation to interstate commerce. It cannot legislate against the state ownership upon any other subject; and when there is no law of congress to the contrary, if congress has not specifically legislated, such as by making ports of entry, or has not in any other manner taken control of a certain stream, the state can do such acts in accordance with its sovereignty as, in the opinion of the state, are best for the people and the public, always, however, subject to the future exercise of the power of the United States. And it is the repeated decision of the supreme court of the United States that such being the title of the original thirteen states to the soil beneath navigable water, that, when new states came into the union, they came in with exactly the same rights as were enjoyed by the old states.

In addition to this, it is held that where the United States acquires by purchase or treaty any territory, the United States holds it subject to the future rights of such states as may be carved out of it; and that the United States, therefore, is debarred from ever owning the soil under any navigable river in any state now organized or that may be hereafter organized.

All rivers which the United States may declare to be navigable shall forever remain free to the public as public highways, subject to the foregoing rights of the states.

SEC. 39. State Control and Interstate Commerce.

The United States is the repository of the power to regulate interstate commerce, and must not only regulate it, but must preserve and continue it. The United States is the guardian of interstate commerce, and must not only define the term, but must designate the instruments of interstate commerce, must foresee and protect its capabilities, must safeguard its interests, must protect it from invasion. The United States government may forecast the future and see that a river, useless to-day by reason of primitive conditions, may to-morrow, by reason of improvement, be an artery of commerce. What right has any one to say to the United States, as the primary owner of the soil, that, looking into the future and imagining what might happen under certain contingencies, it cannot hold to itself the power to regulate at some future time, for the benefit of commerce, any stream in its territory? These are governmental powers, not judicial.

We claim that no state can fetter the decision of the United States as to how far a river is navigable, nor can any court compel the United States to decide as to how far up any stream the navigability extends; nor can any court, state or person question or overturn the decision on that subject which a political department of the government of the United States may make; nor can any state encroach upon the power of the United States by disputing the navigability of a stream which the United States treats as navigable.

The action of the political branches of the government in a matter that belongs to them is conclusive.

(Williams v. Suffolk, 13 Pet. 415, 420.) Hence the United States government could survey as it pleased, controlled only by congress; and if the United States and Kansas both agree that the Arkansas river in Kansas is navigable, Colorado cannot be heard to question it, doubt it, or complain. A state may, in absence of congressional action, say whether or not a river in the state is or is not navigable. But Colorado cannot say whether or not a river in Kansas is navigable; it is not an affair of Colorado. The United States and Kansas will settle that. If Kansas claims title to the bed of a river within its boundary, Colorado cannot impeach the title. The state sovereignty which Colorado claims in a great measure it must concede in a small measure to Kansas, because, if Kansas has any sovereignty at all, it has control over the beds of such rivers as the United States pronounces to be navigable and entrusts to its care and protection for the people and the public; and it can legislate regarding them.

"The Wisconsin river is a meandered stream according to the government survey of public lands. Although it is not navigable in its unimproved condition above the site of the dam for steamboats navigating the Mississippi river, yet it is navigable in the common sense of the term." . . .

"This law establishes by statute the inherent common-law right of the legislature to investigate and ascertain the extent of the navigability of streams, and of the kind of the proposed partial obstruction to navigation for the general convenience and use of the people." (Woodman v. Kilburn, Fed. Cas. No. 17,978.)

If the United States, as the primary owner of the soil, treats a river as navigable in its surveys, in its legislation, and in its departmental action, no one has the

right to question it except the United States; and the stream should be treated as navigable, and no individual or state should be allowed to deny the navigability.

Hence, in the discussion of this proposition, we do not care to go into the question as to whether or not in Kansas the Arkansas river is or was in fact a navigated or a navigable river.

SEC. 40. The Act of Congress, 1866.

If, therefore, the state of Kansas owned the water-bed of the Arkansas river, in trust for the people and the public, the United States could not, after the admission of the state, make any law by which any of the land of the United States or of the public domain should be used to the detriment of the state of Kansas or any owner of land therein.

By the admission of the state of Kansas the rights of the parties became definite and fixed. The proprietorship of Kansas over the water-bed of the Arkansas river, and to the water naturally flowing thereon, could only be limited by the United States for purposes of interstate commerce. If by any chance it should happen that interstate commerce would be affected by the act of the state, the United States could intervene; but the taking of all of the water from a stream bed for purposes of local irrigation is *not interstate commerce*, and hence the United States had no right to take away from the state of Kansas the water flowing in the water-bed.

This being the situation of affairs and the condition of the law after the admission of Kansas, January 29, 1861, afterwards, on July 26, 1866, the first statute of the United States was passed which granted any rights

of irrigation. (14 S. L. 253; Rev. Stats. 2339.) A copy of said act is as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

At the time the above act was passed, Kansas owned the bed of the Arkansas river, in trust for the people and the public. It owned school sections lying and abutting upon the river-bed, granted by the act of admission of the state in 1861, in trust for the people and the public. It now owns the land on which the soldiers' home and state reformatory are situated, also, in trust for the people and the public. It acquired one-half of the valley of the Arkansas, under the land grant, in trust, as above set forth. Therefore, the United States could not, in 1866, pass any law which would result in diminishing the value of the property so vested, and every piece of granted property sold by the state of Kansas passed with it the right of immunity from future injurious congressional legislation.

SEC. 41. The Pacific States Doctrine.

The controversy between Kansas and Colorado emanates from the clashing of business interests growing out of the development of a new country. In the newer state on the west, semi-mountainous and semi-arid, it was found that in places the old principles, customs and laws were frequently inapplicable to prevailing conditions, and a principle, custom and law of the land was put in force, based on the civil law that formerly obtained. This is known as the right of prior appropriation of waters, or, in other words, "The Pacific States Doctrine." Does this doctrine supersede the doctrine of riparian rights? Or does it apply only where the common-law doctrine of riparian rights was never applied and is never invoked? These questions may be answered by a consideration of the following cases, and the cases therein cited and quoted:

Atchison v. Peterson, 20 Wall. 507.
Basey v. Gallagher, 20 id. 671.
Jennison v. Kirk, 98 U. S. 456.
Sturr v. Beck, 133 id. 541.
United States v. Rio Grande Co., 174 id. 690.
Schwab v. Beam, 86 Fed. 41.
Howell v. Johnson, 89 id. 556.
Pine v. New York, 103 id. 337.
Benton v. Johncox, 17 Wash. 277.
Gould v. Eaton, 117 Cal. 539.
New Whatcom v. Fairhaven Co., 64 Pac. 735 (Wash. 1901).

SEC. 42. Pacific States Doctrine.—Federal Cases.

In Basey v. Gallagher, Mr. Justice FIELD says:

"The question on the merits in this case is whether a right to running waters on the public lands of the United States, for purposes of irrigation, can be acquired by prior appropriation, as against parties not having the title of the government. Neither party has any title from the United States; no question as to the rights of riparian proprietors can, therefore, arise." (20 Wall. 671.)

In Sturr v. Beck, Mr. Chief Justice FULLER says:

"The right of a riparian proprietor of land bordering upon a running stream to the benefit to be derived from the flow of its waters as a natural incident to, or one of the elements of, his estate, and that it cannot be lawfully diverted, against his consent, is not denied, nor does the controversy relate to the just and reasonable use, as between riparian proprietors." . . .

"When, however, the government ceases to be the sole proprietor, *the right of the riparian owner attaches, and cannot be subsequently invaded.* As the riparian owner has the right to have the water flow *ut currere solebat,* undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy, with intent to appropriate the land, should have the same effect." (133 U. S. 541, 547, 551.)

In United States v. Rio Grande Co., Mr. Justice BREWER says:

"Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be recognized: First, that, in the absence of specific authority from congress, a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its

waters, so far, at least, as may be necessary for the beneficial uses of the government property." . . .

"Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the western states an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain states, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those states, by custom and by state legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as those rules have only a local significance, and affect only questions between citizens of the state, nothing is presented which calls for any consideration by the federal courts." (174 U. S. 690.)

In Schwab v. Beam, Judge HALLETT says:

"Many authorities cited by counsel expound the law relating to the irrigation of agricultural lands in arid regions. An early advocate of the right to appropriate water for irrigating lands, as always understood and maintained in this state, the author of this opinion desires to recognize and enforce the principle on which it stands in every case to which it may be applicable. It is believed that the chief purpose of article 16 of the constitution of the state of Colorado is to maintain and establish the wise principle of appropriation and continual use, which was fully understood by the makers of that instrument. *But nothing in the constitution of the state or in the law relating to irrigation in any way modifies or changes the rules of the common law* in respect to the diversion of streams for manufacturing, mining or mechanical purposes. In Colorado, as elsewhere in the United States, the law is now, as it has been at all times, that for such purposes each riparian owner may use the waters of running streams on his own premises,

allowing such waters to go down to subjacent owners in their natural channel. The injunction will be allowed, according to the prayer of the bill." (86 Fed. 41, 44.)

SEC. 43. Arid Lands.—Benton v. Johncox.

(SYLLABUS.) "The common-law doctrine touching riparian rights is not within any of the exceptions specified in Laws 1863, page 68, as amended by Code Proc., section 108, providing that the common law, so far as it is not inconsistent with the constitution and laws of the United States and the organic act and laws of Washington, nor incompatible with the institutions and condition of society 'in this state,' shall be the rule of decision in all the courts of the state; and hence such doctrine applies to the arid portions of the state."

(SYLLABUS.) "The riparian rights of a patentee of the government attach at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land."

(OPINION.) "But the legislatures of those states and territories have attempted to abolish the common-law doctrine relative to private property in watercourses and to riparian rights generally. (Pom. Rip. Rights, 106.) And the decisions above cited are presumably in accordance with the local statutes, though some of them, it appears, were grounded solely on the assumption that the rules of the common law were inapplicable, by reason of the aridity of the soil and the consequent necessity for extensive irrigation. But how it can be held that that which is an inseparable incident to the ownership of land in the Atlantic states and the Mississippi valley is not such an incident in this or any other of the Pacific states, we are unable clearly to comprehend. It certainly cannot be true that a difference in climatic conditions or geographical position can operate to deprive one of a right or property vested in him by a well-settled rule of common law. The mere fact that the appellants will not be able to occupy or cultivate their lands as they heretofore have done unless they can irrigate them with water taken from the

Ahtanum river is no sufficient reason for depriving the respondents, who settled upon that stream in pursuance of the laws of the United States, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent, and without compensation. If it be true, as claimed by appellants, that, if the judgment of the court below is affirmed, their lands will again become a barren waste, and cease to 'blossom as the rose,' it is equally true that, if the waters of the river are diverted from its channel, the premises of the respondents will become unproductive and utterly worthless. 'The aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated.' (McKinstry, J., in Lux v. Haggin, 69 Cal. 255.) The question of the applicability of the common law in controversies respecting water rights in the mineral districts of California was lucidly discussed by Chief Justice Sanderson in Hill v. Smith, 27 Cal., at page 482. With reference to the charge of the trial court, which seemed to be based on an erroneous view of the law with respect to the rights of miners and ditch owners using the water of a stream for mining purposes, the learned chief justice said: 'This is due in a great measure, doubtless, to the notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this state, upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them

are changed, and not the rules themselves. The maxim, *Sic utere tuo ut alienum non lædas*, upon which they are grounded, has lost none of its governing force. On the contrary, it remains now, and in the mining regions of this state, as operative a test of the lawful use of water as at any time in the past or in any other country.'" (Benton v. Johncox, 17 Wash. 277.)

SEC. 44. Arid Lands.—Gould v. Eaton.

(SYLLABUS.) "Each riparian owner is entitled to the natural flow of the stream through his land, with the limitation that the superior proprietor may take therefrom such an amount as he is entitled to for riparian purposes; but such superior proprietor cannot, as against an inferior proprietor, divert to non-riparian lands the water which he would have a right to use for riparian purposes, but which he does not in fact use, since his riparian right is appurtenant to the land bordering on the stream."

(SYLLABUS.) "Where non-riparian owners divert part of the waters of a stream, and claim the right to do so, the right of a riparian owner to an injunction does not depend on the amount of injury received, since he is entitled to the flow of the entire stream, as against them, and their claim to the right to divert it authorizes him to invoke the aid of equity in order that such claim may not ripen into a right. . . . . .

"The rights of a riparian owner are limited to the ordinary and reasonable use of the water which flows in the stream, and do not include a proprietorship in the corpus of the water. His right to the water is limited to its use for such as are termed ordinary purposes—*ad lavandum et ad potandum*—or such other uses as are connected with the land bordering on the stream. It is not necessary here to determine the extent to which such uses may be carried or the purposes to which the water may be applied. They do not, in any case, include the right, as against an inferior proprietor, to divert the water to non-riparian lands. Each riparian owner is entitled to the natural flow of the stream through his land, with the limitation, however, that

the superior proprietor may take therefrom such an amount as he is entitled to for riparian purposes. The superior proprietor cannot, however, divert to non-riparian lands the water which he would have a right to use for riparian purposes, but which he does not in fact use. His riparian right is appurtenant to the land bordering on the stream, and does not give him the right to divert the water to lands which are not riparian to the stream; and, as he cannot exercise this right himself, he cannot, as against an inferior proprietor, confer it upon another." (Gould v. Eaton, 117 Cal. 539.)

SEC. 45. Arid Lands.—New Whatcom v. Fairhaven.

(SYLLABUS.) "A city which has become a riparian owner on a navigable lake and on its non-navigable natural outlet has no right to divert the water of the lake for municipal purposes, and thus lessen the natural flowage of the water in such outlet, to the injury of a lower riparian owner and prior proprietor, without compensating him therefor. . . . . .

"In the two cases cited it is held that every riparian proprietor, in the absence of a grant, license or prescription limiting his right, is entitled to have the stream which passes over or adjacent to his land flow as it is wont by nature, affected only in quantity or quality by the consequence of a reasonable use thereof by other proprietors, and that the riparian proprietor's right to the flow of the water is inseparable annexed to the soil, and passes with it, as a part and parcel of it; that a riparian proprietor may divert the water from the stream as it passes through his own land, without license from the proprietors above him, if he does not obstruct the water from flowing as freely as it was wont, and without license from the lower proprietors, if he restores the water to its natural channel before it enters their land, and does not materially diminish its flow. . . .

"As was said by the Missouri court of appeals in Meyers v. City of St. Louis, 8 Mo. App. 266: '*When it is settled that riparian rights are property—and of this there seems to be no doubt—the question as to the right to take them is at an end.*'" (Wash. 1901, in 64 Pac. 735.

SEC. 46. Pacific States Doctrine Restated.

The congressional law of 1866, found in section 40 hereof, and upon which Colorado bases its rights, is simply a law as between appropriators of water, and not a law as between riparian rights, already vested, and appropriators. The common-law riparian rights are underlying and fundamental, and take precedence of appropriators of water, *if prior in time*. The law of prior appropriation and of riparian rights stand side by side. They do not overthrow, but they supplement, each other. They are both needed, and congress never intended anything contrary. This is true because the two may never exist together in the same place, and where the one may exist the other could have no application, and each remains separate, distinct, and complete.

Herewith follows a list of every irrigation decision in the United States courts, and they may be searched in vain for any contrary doctrine:

Atchison v. Peterson, 20 Wall. (U. S.) 507, Mont., 1874.
Basey v. Gallagher, 20 id. (U. S.) 670, . . . Mont., 1874.
Jennison v. Kirk, 98 U. S. 453, ... Cal., 1878.
Broder v. Water Co., 101 id. 274, ... Cal., 1879.
Sturr v. Beck, 133 id. 541, ... Dak., 1890.
Bybee v. Railroad Co., 139 id. 663, ... Ore., 1891.
Bear Lake v. Garland, 164 id. 1, ... Utah, 1896.
Fallbrook v. Bradley, 164 id. 112, ... Cal., 1896.
United States v. Rio Grande, 174 id. 690, . . N. M., 1899.
Consolidated v. Mesa, 177 id. 296, ... Ariz., 1900.

Hewitt v. Story, 12 C. C. A. 250, ... Cal., 1894.
Montana v. Gebring, 21 id. 414, ... Mont., 1896.
Krall v. United States, 24 id. 543, ... Idaho, 1897.
Valcald v. Silver, 29 id. 591, ... Nev., 1898.
United States v. Gallegos, 32 id. 470, ... Colo., 1898.
Travis v. Mills, 37 id. 536, ... Mont., 1899.

Union Mills v. Ferris, No. 14,371, Fed. Cas., Nev., 1872.
Union Mills v. Daugbey, No. 14,370, id., . . Nev., 1873.
Mason v. Cotton, 4 Fed. 792, ... Colo., 1880.
Hardt v. Liberty, 27 id. 788, ... Cal., 1886.
Salem v. Stanton, 33 id. 146, ... Ore., 1887.
Doyle v. San Diego, 46 id. 709, ... Cal., 1891.
Ison v. Nelson, 47 id. 199, ... Ore., 1891.
Last v. Bunker, 49 id. 430, ... Idaho, 1892.
Hewitt v. Story, 51 id. 101, ... Cal. 1892.
Saunders v. Water, 58 id. 133, ... Va., 1893.
Wilson v. Higbie, 62 id. 723, ... Nev., 1894.
Hewitt v. Story, 64 id. 510, ... Cal., 1894.
Union v. Dangberry, 81 id. 73, ... Nev., 1897.
Miller v. Perris, 85 id. 693, ... Cal., 1898.
Schwab v. Beam, 86 id. 41, ... Colo., 1898.
Rodgers v. Pitt, 89 id. 420, ... Nev., 1898.
Howell v. Johnson, 89 id. 556, ... Mont., 1898.
Cruse v. McCauley, 96 id. 369, ... Mont., 1899.

SEC. 47. Chronology.

The sections cited in the following table refer to sections of this brief.

Ordinance Northwest territory,	Jul. 13, 1787, 1 S. L. 51.
Creation of Indiana territory,	May 7, 1800, 2 S. L. 58.
First law of Indiana territory,	Jan. 19, 1801, sec. 6.
Law concerning Louisiana,	Oct. 31, 1803, 2. S. L. 245.
Creation of district of Louisiana,	Mar. 26, 1804, 2. S. L. 283.
Legislation for dist. of Louisiana,	Oct. 1, 1804, sec. 8.
Creation of territory of Louisiana,	Mar. 3, 1805, 2 S. L. 331.
First law of Louisiana territory,	May 6, 1806, sec. 9.
Creation of territory of Illinois,	Feb. 3, 1809, 2 S. L. 514.
St. Louis incorporated,	Nov. 9, 1809, sec. 10.
Navigable rivers free,	Mar. 3, 1811, 2 S. L. 666.
Creation of Missouri territory,	Jun. 4, 1812, 2 S. L. 743.
First law of Missouri territory,	Jul. 28, 1813, sec. 12.
Common law, Missouri territory,	Jan. 19, 1816, sec. 12.
Common law, Mo. terr. (U. S.),	Apr. 29, 1816, 3 S. L. 328.
Admission offered to Missouri,	Mar. 6, 1820, 3 S. L. 545.

Missouri admitted,	Mar. 2, 1821, 3 S. L. 645.
Boundary of U. S. and Mexico,	Jan. 12, 1828, 8 S. L. 372.
Indian country established,	June 30, 1834, 4 S. L. 729.
Declaration Texas independence,	Oct. 17, 1835, sec. 15.
Texas constitution adopted,	Mar. 17, 1836, sec. 15.
Texas boundaries established,	Dec. 19, 1836, sec. 19.
Texas boundaries reestablished,	Apr. 25, 1838, 8 S. L. 511.
Common law, Texas,	Mar. 16, 1840, sec. 15.
Cession Texas to United States,	Sept. 9, 1850, 9 S. L. 446.
Creation of Kansas territory,	May 30, 1854, 10 S. L. 283.
Creation of Arapahoe county	Nov. 1, 1855, sec. 23.
Common law, Kansas,	Nov. 1, 1855, sec. 24.
Common law reenacted,	Feb. 11, 1859, sec. 25.
Arapahoe county represented,	Jan. 1860, sec. 26.
Kansas admitted,	Jan. 29, 1861, 12 S. L. 126.
Creation of Colorado territory,	Feb. 28, 1861, 12 S. L. 172-176.
U. S. land grant to Kansas,	Mar. 3, 1863, 12 S. L. 772.
Kansas accepts grant,	Feb. 13, 1864, sec. 33.
First irrigation law (U. S.),	Jul. 26, 1866, 14 S. L. 253.
Second irrigation law (U. S.),	Jul. 27, 1870, 16 S. L. 218.
Colorado admitted,	Aug. 1, 1876, 19 S. L. 665.

SEC. 48. The American Jus Gentium.

As the state of Kansas obtained its majority January 29, 1861, and as Colorado remained a minor until 1876, at which time it obtained its majority, what are the legal relations between them after admission to the union?

What law, if any, is to govern the action of one state towards the other; that is, what law governs the relations between the states, as individuals, when they deal with each other and treat with each other as one individual deals and treats with another? No statute law has ever been adopted to govern the conduct of one state as a unit against another state as a unit. There

are no compacts between the states, except the compact of the constitution. There are no treaties, and there can be none, between one state and another. There are no ministers, resident or plenipotentiary, from one state residing at the capital of another, charged with the representation to the sovereignty of any wrongs suffered or rights denied. Are the states of the American union, in their conduct towards each other, to be governed by theories of international law, which each nation, itself indifferent, wishes every other nation to fully observe; which one nation ignores, but still insists the other shall recognize?

It seems to us that there exists an American *jus gentium* as between the states, based upon the common law, as just and as fair as the common law, and as rigid in its requirements. The relations of one state in this union to another should not be governed by the abstract principles of the law of nations. A different relation should exist between the states than that which exists between nations differing in race, religion, and form of government.

The states of the union belong to a family. They are not independent of each other. They cannot act as independent nations towards each other. They can neither make treaties of peace nor declarations of war.

"Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree or fight with its adversary without the consent of congress." (Rhode Island v. Massachusetts, 12 Pet. 657, 726.)

If the constitution was organized among other things to "insure domestic tranquillity," is not the common

law in the constitution the rule by which the tranquillity should be maintained?

State sovereignty does not mean what it did fifty years ago, and while in a limited sense the United States is a family of nations or nations to be, are there not family ties which restrict the theory of sovereignty, and is not the American *jus gentium* to be interpreted in its ethics, morality and law by the family traditions and relationship of the states?

SEC. 49. Inter-municipal Law.

We have shown that the common law in three strata covered at one time the state of Kansas and the drainage basin of the Arkansas river in Colorado. When the territorial area was subdivided into states, would not that common law still exist as between the units of the subdivided territory? Nothing has intervened to repeal it.

And as regards navigable rivers, are not the states in the same relation as individuals owning separate independent farms along the banks of the rivers? To illustrate: There are situated along the line of the Mississippi river the states of Minnesota, Wisconsin, Iowa, Illinois, Missouri, Arkansas, Kentucky, Tennessee, Mississippi, and Louisiana. Each of these states may be likened to a separate farm situated along the line of a clear, dashing, non-navigable, boatless stream. Illinois has riparian rights; so have Kentucky and Tennessee. Minnessota has no right to divert the stream from Illinois, nor has Kentucky the right to divert it from Louisiana. The Mississippi river, furnishing vast and incalcuable benefits to a state, that state has an in-

terest in the river through its entire length as against the encroachment of another state, the same as exists between two farms on a smaller stream.

In the illustration given of the twelve states, it is the same as if twelve brothers owned land separately in fee, and lived along the stream enjoying riparian rights, with title derived from a common ancestor. From what source would the law naturally be derived which these brothers would recognize, except it be the ancestral common law, the *jus gentium* of our race? In the only compact between the states the common law is recognized. It furnishes the rules of decision. It furnishes the courts and the remedies. It prescribes the tribunal where one state may go to seek justice from another, and we call attention to the case of Western Union v. Call, 181 U. S. 92, in which the question came up as to what rule of law governed in interstate transactions as between individuals engaged in interstate commerce, over which interstate commerce the congress of the United States had assumed control. It is true that the suit was between individuals and not between states, but the same analogies prevail. The court said:

"The principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment."

In suits against the United States, in the court of claims, the common law governs in the trial of cases.

"We know of no system of law by which it (the court) should be governed other than the common law. That is the system from which our judicial ideas and legal definitions are derived." (Moore v. United States, 91 U. S. 270.)

In the various suits of one state against another the theories of common-law rights and remedies have been treated as existing. There seems never to have been any question raised. The rights of parties diverting in one state water to which parties in another state had riparian rights have frequently been before the courts.

Foot v. Edwards, 2 Blatchf. 310 (Fed. Cas. No. 4908).

New York City v. Pine, Fed. (1901), C. C. A.

Rutz v. St. Louis, 7 Fed. 438.

Holyoke v. Conn. Co., 22 Blatchf. 131.

SEC. 50. Common Law.—Chisholm v. Georgia.

The historical reasons for asserting that the rules of the common law govern the rights of states are numerous, and so involved that a proper discussion of them cannot be entered into within the limits of this brief. In the case of Chisholm v. Georgia, 2 Dall. 419, the court asked the discussion of this question: "If the state of Georgia can be made a party defendant in certain cases, does an action of assumpsit lie against her?" In the scholarly discussion of this question from a historical standpoint, by Attorney-general Randolph, much is found that bears directly upon this question in favor of a common-law liability of states.

In the opinion of Mr. Justice IREDELL in that case, it is said that the only laws applicable to such cases are, first, those of the particular laws of the states against which the suit is brought; or, second, principles of law common to all the states. And, after determining that none of the statutes of Georgia were applicable to the case, he says (435):

"The only principles of law, then, that can be re-

garded, are those common to all the states. I know of none such, which can affect this case, but those that are derived from what is properly termed 'the common law,' a law which I presume is the groundwork of the laws in every state in the union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each state, as it existed in England (unaltered by any statute), at the time of the first settlement of the country. The statutes of England that are in force in America differ perhaps in all the states; and, therefore, it is probable the common law in each is in some respects different. But it is certain that, in regard to any common-law principle which can influence the question before us, no alteration has been made by any statute which could occasion the least material difference or have any partial effect. No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every state in the union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course the part not surrendered must remain as it did before. The powers of the general government, either of a legislative or executive nature, or which particularly concern treaties with foreign powers, do for the most part (if not wholly) affect individuals and not states. They require no aid from any state authority. This is the great leading distinction between the old articles of confederation and the present constitution. The judicial power is of a peculiar kind. It is indeed commensurate with the ordinary legislative and executive powers of the general government and the power which concerns treaties. But it also goes further. Where certain parties are concerned, although the subject in controversy does not relate to

any of the special objects of authority of the general government, wherein the separate sovereignties of the states are blended in one common mass of supremacy, yet the general government has a judicial authority in regard to such subjects of controversy, and the legislature of the United States may pass all laws necessary to give such judicial authority its proper effect. So far as states under the constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires. The authority extends only to the decision of controversies in which a state is a party, and providing laws necessary for that purpose. That surely can refer only to such controversies in which a state can be a party; in respect to which, if any question arises, it can be determined, according to the principles I have supported, in no other manner than by a reference either to preexistent laws or laws passed under the constitution and in conformity to it."

SEC. 51. Common Law.— Pennsylvania v. Wheeling B. Co.

In the case of Pennsylvania v. The Wheeling and Belmont Bridge Company, as reported in 13 How. 519, Mr. Justice McLEAN says (563):

"But it is objected, if not as a matter going to the jurisdiction, as fatal to any further action in the case, that there are no statutory provisions to guide the court, either by the state of Virginia or by congress. It is said that there is no common law of the union on which the procedure can be founded; that the common law of Virginia is subject to its legislative action, and that the bridge having been constructed under its authority, it can in no sense be considered a nuisance; that whatever shall be done within the limits of a state is subject to its laws, written or unwritten, unless it be a violation of the constitution or of some act of congress.

"It is admitted that the federal courts have no jurisdiction of common-law offenses, and that there is no abstract pervading principle of the common law of the

union under which we can take jurisdiction. And it is admitted that the case under consideration is subject to the same rules of action as if the suit had been commenced in the circuit court for the district of Virginia.

"In the second section of the third article of the constitution it is declared 'the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority.'

"Chancery jurisdiction is conferred on the courts of the United States, with the limitation 'that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law.' The rules of the high court of chancery of England have been adopted by the courts of the United States. And there is no other limitation to the exercise of a chancery jurisdiction by these courts except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, and which has been decided against in a state court.

"In exercising this jurisdiction, the courts of the union are not limited by the chancery system adopted by any state, and they exercise their functions in a state where no court of chancery has been established. The usages of the high court of chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government it has been observed. . . .

"Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the union.

"An indictment at common law could not be sustained in the federal courts by the United States against the bridge as a nuisance, as no such procedure has been authorized by congress. But a proceeding, on the ground of a private and an irreparable injury, may be sustained against it by an individual or a corporation. Such a proceeding is common to the federal courts and also to the courts of the state. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case

where the jurisdiction is made out, the same as in a public prosecution. If the obstruction be unlawful, and the injury irreparable, *by a suit at common law*, the injured party may claim the extraordinary protection of a court of chancery.

"Such a proceeding is as common and as free from difficulty as an ordinary injunction bill against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted and as effectual for relief in the case of a private nuisance as in either of the cases named. And in regard to the exercise of these powers, it is of no importance whether the eastern channel, over which the bridge is thrown, is wholly within the limits of the state of Virginia. The Ohio being a navigable stream, subject to the commercial power of congress, and over which that power has been exerted, if the river be within the state of Virginia, the commerce upon it, which extends to other states, is not within its jurisdiction; consequently, if the act of Virginia authorized the structure of the bridge so as to obstruct navigation, it could afford no justification to the bridge company."

SEC. 52. Common Law.—Suits between States.

As to that wide sphere of political and corporate action which lies outside the enumerated powers of the federal constitution, and within the powers reserved to the individual states, it seems to have been conceded that the broad and flexible principles of the common law, the result of generations of experience in pursuit of absolute justice, are the most suitable, and an abundance of reason for their adoption is found in the history of our government and the course of its judicial development.

In the case of Rhode Island v. Massachusetts, 12 Pet. 657, Mr. Justice BALDWIN said (737):

"The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them,

without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294), which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo,* of political power; it comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires."

It is apparent from the opinion of Chief Justice MARSHALL in the case of New York v. New Jersey, 5 Pet. 284, in which is discussed at length the procedure to be followed in suits between states, that not only the modes of procedure obtaining in suits at law and in equity at the common law but the rules of substantial justice so prevailing should be applied.

In the case of Rhode Island v. Massachusetts, 12 Pet. 657, the court says, in substance, on page 749, that the rules of procedure being established and the issues framed, the court must decide according to the law of equity whether the agreement pleaded shall settle, or leave the boundary open to settlement, by its judgment according to the law of nations and charters from the crown, or by the law of prescription, as claimed by the defendant.

The case of The State of Missouri v. The State of Iowa, 7 How. 660, was also a suit commenced by the filing of a bill in equity for the purpose of determining the boundary between the two states. It was tried and decided according to the rules of equity practice and the principles of the common law.

The State of Florida v. The State of Georgia, 17 How. 478, is another case in which the rules of equity pleading and practice and the doctrines of the common law were applied.

Also the case of The State of Alabama v. The State of Georgia, 23 How. 505, in which Mr. Justice WAYNE says (512):

"The contract of cession must be interpreted by the words of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, and the writings of publicists in reference to the settlement of controversies between nations and states as to their ownership and jurisdiction on the soil of rivers within their banks and and beds. Such authorities are to be found in cases in our own country and in those of every nation in Europe."

The power of the court to exercise jurisdiction in an equity suit involving a disputed boundary between states was again discussed, and decided in favor of the power to hear and determine the question, in the case of The State of Virginia v. The State of West Virginia, 11 Wall. 39.

In the case of The State of South Carolina v. The State of Georgia, 3 Otto, 4, the court construed a contract made between the states prior to the adoption of the constitution, and determined that it was superseded thereby.

The cases of New Hampshire and New York against the State of Louisiana were suits upon obligations of the defendant formerly held by citizens of the respective states, and which had been assumed by them. The opinion discusses the rights of the parties at common

law, international law, and under the constitution of the United States and the eleventh amendment thereto. It was held that as the states were simply loaning their names to the owners of the coupons sued upon, the actions violated the eleventh amendment, and therefore could not be maintained.

The decision upon the demurrer in the recent case of Missouri v. Illinois shows that this court has adopted the rules of the common law regarding nuisances as a basis for determining the controversy.

Analagous to the foregoing are the following cases:

The case of The State of Texas v. White *et al*, 7 Wall. 564, involving the ownership of certain bonds, was decided in accordance with the rules of the common law. The doctrines of the law merchant were there invoked with no reference to the statutes of Texas or any other rule of law obtaining in that state, and judgment was rendered in favor of the plaintiff.

The case of Wisconsin v. Pelican Insurance Co., 127 U. S. 265, was an action of debt to recover a judgment rendered against the defendant under a penal statute. It was held that, as by the law of England and the United States, one state or country will not enforce the penal laws of another state, the case could not be maintained.

SEC. 53. Common Law.—Conclusion.

The conclusions to be drawn from the foregoing cases are, that in suits between states the entire body and system of laws regulating in general the duties and rights of persons, as applied in the United States, will be applied, together with such maxims of international

and public law as are applicable thereto. In other words, the common law of England, as generally administered in the United States, will be called into use and its terms used in measuring the rights and duties of the respective states of the union toward each other. It could not have been intended that this court was authorized to take jurisdiction of suits between states, and modes of procedure provided or authorized, without substantive law to be administered. The solution of the question was easy, the course of action so plain, that it has been generally conceded, and few have ever objected thereto. The common law, consisting of general principles, founded upon reason, natural justice, and enlightened public policy, was at hand and used as a basis for the government of all the original states of the union. It has been seized upon and applied, so far as it would reach the necessities of each case of this kind, until it must now be conceded that it is the rule of action which must govern within its sphere the conduct of states toward each other.

States in their corporate capacities may own property. They may contract with persons and corporations and under some circumstances with each other. Each of these matters involves a wide scope of action and relations which frequently extend outside their borders. States may inflict wrongs upon other states or assert rights against them. Independent states must resort to the courts of other states, to diplomacy or war for the adjustment of conflicting claims so arising. The first of these remedies is often inadequate; the others are forbidden to each of the United States. The provisions in the articles of confederation for the adjustment of

such disputes, the debates upon the subject in the constitutional convention and the history of our constitutional provisions upon this subject are familiar to the members of this court. No mention is made, however, of the law to be applied, and from this we must conclude that this court was conceded to possess the right to enforce such laws as are applicable in each of the cases of original jurisdiction brought therein, and that when the maxims of international law are inadequate, as must frequently occur, the rules of the common law should be applied.

The legislative power and judicial jurisdiction of the states are coextensive with their territory. Neither their laws nor the judgments of their courts have any extra-territorial force; hence they have not the power or right to make enactments or render decisions which interfere with the common-law rights of other states or the inhabitants of other states. Nor should their statutes or decisions be regarded as rules of decision in interstate cases.

As the states have no power to pass laws regulating carriers of interstate traffic, and the principles of the common law operate thereon untrammeled by state legislation or action, and as all cases brought with reference thereto must be tried in accordance with the procedure of that system, and the rights of the parties be likewise determined, unless the legislation of congress interfere, so must the conflicting rights of states be adjudicated when brought into this court. State constitutions, laws and decisions should no more affect such cases than as though they did not exist.

We will therefore postulate an American *jus gentium*

as applied to and governing the states of the American union—an unwritten code of the highest ethics, morality, and justice, based on the common law, and compelling each state to exercise towards the other the highest comity, consideration, and good will.

SEC. 54. International Common Law.

If the foregoing is the law, it is denied by the state of Colorado; and if such is the law, it has existed from the formation of the states. It has existed from the beginning of the American union. It is one of the rights, privileges and immunities of the states. It belongs to the states. The states in the constitution did not confer upon congress the right to make any law which would take one right from a state and give it to another; and if the common law was the heritage of a state as well as the heritage of the people of a state, then it is by common-law principles and theories that the case before us is to be governed; and if so governed, the acts of Colorado are tortious, and can have no added importance as being consented to by the congress of the United States. And the state of Colorado cannot by its constitution deprive Kansas of any of the latter's rights. And congress cannot legally approve of such action on the part of Colorado, and if approving, it will be of no legal avail. And Kansas cannot by any legislation or by any state constitution herself deprive the state of Missouri or the Indian territory of any of their riparian rights, even if the United States should consent.

If it be denied that there is an American *jus gentium*, and if it be claimed that congress is all-powerful to es-

tablish the relations between states, and if it be admitted that congress can authorize one state to build itself up upon the downfall or misfortune of another, then the states will not remain free and equal.

This question is one which at present may assume a slight and uninteresting phase, but it is one of gigantic importance. The question is only in its infancy. There is not a state in the union out of which or into which a meandered or navigable stream does not flow, and sooner or later the question will press for decision from many points; and the case must be decided not only from an American standpoint, but it must be decided from the standpoint of the opinion of the civilized world. Suppose that Switzerland should turn Lake Constance from the head of the Rhine into the Danube, would it be deemed a legitimate exercise of sovereignty? By no means; the governments on the Rhine would immediately take up the matter and insist that it was a cause for war. If the enterprising city of Chicago in some miraculous future should dig a channel to the Mississippi and, draining the waters of the lakes, leave the St. Lawrence a mere brook, and if Canada should protest or England should protest, could the United States in a flippant manner reply that the sovereignty of part of the soil controlled the entire stream? Would not that question ultimately be settled by arbitration or by the thunder of cannon on Long Island sound or in the British channel?

If Russia should appropriate a portion of a German river, and cause great loss to Germans and German communities, or if Italy should appropriate, if it were possible, a portion of a French river, and seek to build

itself up on the destruction of the latter's agriculture or commerce, would not an imperious protest be immediately filed; and would not the assertion of the right of diversion, if insisted on, provoke a war; and would not war be legally justifiable on the part of the nation wronged; and would not the consensus of the civilized world be in favor of the armed power that sought to restore the *status in quo?*

SEC. 55. International Usage.

Rights upon navigable streams have always been the subject of national treaties and international cognizance. By the treaty of peace at Paris, in 1815, there was a stipulation that the Rhine and the Scheldt should be and remain free. Afterwards, in the congress of Vienna, the navigable rivers of Germany and Poland were made free; and afterwards, in the convention at Vienna, again the rivers were stipulated—the Rhine, the Scheldt, the Meuse, the Mosel, the Elbe, the Oder, the Weser, the Danube, and the Po, with all their confluent rivers—to remain free. And, under the treaty, the English government claimed, and has always claimed, the freedom of the navigation of the Rhine. And at the convention at Mayence, in 1831, all of the riparian states along the Rhine concluded a treaty between themselves that the Rhine should be free throughout its entire navigable course, including the mouths in the kingdom of the Netherlands, the outlets of the Leck and the Waal and two other outlets, and the artificial canals. And the rivers of this continent have been made the subject of treaty, especially the St. Lawrence, the Amazon, the Parana, and the Rio Grande.

The doctrine of absolute sovereignty over a portion of a navigable river has always been rebutted and disputed in the United States, and during the infancy of our republic, and as early as the instructions given to Mr. Jay, our foreign minister, in 1780; and under the resolution of congress of September, 1788, the United States claimed that the possession by Spain of the lower part of the Mississippi did not give it such exclusive sovereignty as that it could limit the riparian rights of the United States above it or the right of navigation below. And the continued assertion by the United States of its riparian rights as against Spain, although it conceded Spain to have the absolute sovereignty of the lower part of the Mississippi, led to a treaty in which the United States obtained the concessions she demanded. In other words, the United States acted upon the theory of the common law, and treated the situation as being equivalent to two farms situated upon a river in which each farm had definite riparian rights.

And it would appear that the position of Minnesota as regards the Mississippi river and the position of Colorado with regard to the Arkansas river are those of farms at the sources of streams, and that the source of a stream may be likened to a spring which, pouring forth the water, flows in a natural channel through the state of its origin, and down through the other states which occupy the situations of riparian farms; and if the idea is a correct one, and if Colorado can be likened in principle to a farm upon which a great spring is situated, and if the common law is to obtain, then the numerous cases, of which the celebrated Eng-

lish case of Dutton v. Clutton Union, 1 H. & N. 627, is an illustration, can be safely followed. In all the books there is no case concerning a spring so universally cited with approval as authority.

A spring cannot be diverted.

Saunders v. Bluefield, 58 Fed. 133.
Arnold v. Foot, 12 Wend. 330.
Wadsworth v. Tillotson, 15 Conn. 366.
Gillett v. Gillett, 30 id. 180.
Elliott v. Railroad Co., 10 Cush. 191.

SEC. 56. United States and Mexico.

Again, as late as the year 1880, there being a question concerning the diversion of water from the Rio Grande river, under the laws of Mexico, Mr. Evarts, secretary of state, wrote the following letter to Mr. Morgan, the United States minister in the City of Mexico.

"I transmit herewith, for your information in the premises and for your guidance in any future action that may be indicated to you, should any such appear to be necessary, a copy of a letter of the 10th ultimo, together with its various enclosures, from the governor of the state of Texas, asking the intervention of the general government in a matter of vital importance to the citizens of that state living on the eastern shore of the Rio Grande.

"The enclosures, as you will see, consist of the statement of the county judge of El Paso county, and petitions signed by prominent citizens of San Elizario and Socorro.

"The ground of complaint, as alleged, is that the Mexicans engaged in agricultural pursuits on the Mexican shore of the river are in the habit of diverting all of the water that comes down the river during the dry season into their ditches, thereby preventing our citizens from getting sufficient water to irrigate their crops.

"This, if true, would be in direct opposition to the

recognized rights of riparian owners, and if persisted in must result in disaster and ruin to our farming population on the line of the Rio Grande, and might eventually, if not amicably adjusted through the medium of diplomatic intervention, be productive of constant strife and breaches of the peace between the inhabitants of either shore.

"I have addressed a note to the Mexican minister at this capital, requesting him to bring the matter to the attention of his government, with a view to obtaining, if possible, alleviation from these annoyances.

"You will, therefore, investigate the matter as carefully and thoroughly as possible, and will report the result to the department, when, should the facts be found to bear out the allegations set forth in the enclosed correspondence, further action will be taken in the premises."

SEC. 57. Letter to Mexican Minister.

The letter to the Mexican minister at Washington, referred to in the foregoing section, was as follows:

"I have the honor to solicit your most earnest attention to a matter of vital importance to the citizens of the state of Texas engaged in agricultural pursuits on the eastern shore of the Rio Grande.

"A statement of the facts as alleged is given in enclosed copies of correspondence, consisting of a letter addressed to the secretary of state by the governor of Texas, and the enclosures therein contained, being the statement of the county judge of El Paso county and petitions signed by several hundred citizens of San Elizario and Socorro.

"The trouble complained of appears to be the result of the action of the Mexican population on the western shore of the river in diverting, into ditches dug for that purpose, the small quantity of water that finds its way down during the dry season, thereby totally depriving the agriculturists on the eastern or Texan shore of the means of irrigating their crops, and thus cutting of their sole means of livelihood. As this is not only in direct opposition to the *recognized rights of riparian proprietors*,

but is also contrary to that good feeling and harmony which ought to exist between colaborers in peaceful pursuits, and might, moreover, if permitted to continue, result in bitter feeling and possible breaches of the peace, I most earnestly request, in these high interests, that you will have the goodness to bring the matter to the attention of your government, with a view to procuring a cessation of the annoyance complained of.

"I shall be happy to cooperate with you in any way tending to produce the desired result, and have, to that end, already instructed the minister of the United States at Mexico to put himself in communication with your government on the subject, and should the facts prove, upon investigation, to be as stated, to endeavor to have the injustice complained of put an end to."

The foregoing are found in volume 1, Wharton's International Digest, § 20, pp. 62, 63.

Afterwards Secretary Frelinghuysen addressed a letter to Mr. Lowell, United States minister in London, concerning the erection of works on a river in New Brunswick in such a way as to obstruct the flow of water in Maine and to injure the lumbering business in that state. Mr. Frelinghuysen pronounced it a proper subject for diplomatic interposition by the United States government.

SEC. 58. The Law, "Ex Necessitate Rei."

We have alleged that Colorado claims the right of absolute disposal of all the water of the state. This is admitted. The constitution of that state is claimed by the citizens of Colorado to be authority for the laws which the state has passed upon that subject. The extent to which this right is claimed cannot perhaps be better illustrated than by the words of a prominent citizen of Colorado, then lieutenant-governor of the state,

who said to one whose name is signed to this brief: "The water in Colorado is all ours. We have a right to do as we please with it, and we will not let a drop of it flow into Kansas if we can use it, and we think we can."

The bill in this suit alleges that Colorado seeks to use all of the water, and that is admitted. The bill portrays the damages to Kansas; that is admitted. But, there is no authority giving to Colorado the right to use all of the water except such authority as flows from the laws and constitution of Colorado. Colorado, while in every respect a most valuable member of the union of states, has no inherent right to be a law unto herself, and the taking of water is by the Colorado courts based upon the only logical theory that can be argued from, namely, necessity and opportunity.

In the case of Schilling v. Rominger, 4 Colo. 100, 104 (1878), the court says:

"Inasmuch as such right [the right of irrigation] is not only given by a statute [Colorado Laws, 1861, p. 67], but, in a country with a climate like ours, this right arises *ex necessitate rei*, and hence the statute may be regarded as declaratory merely of the law of necessity in this respect, and as regulating the right thus acquired."

Therefore, the Colorado court, in deciding the question, does not invoke the common law, or invoke the *corpus juris*, but puts the doctrine squarely upon the law of necessity. The state of Kansas does not recognize this law of necessity as having sufficient application or sanction to permit the acts of Colorado to go unchallenged. It might be that to deprive Colorado of some of this water might injure the state; but Colorado recognizes that there are natural uses for water and

uses which have priority. Domestic uses come first, mining next, and irrigation last.

If the law of necessity gives Colorado the right to irrigate arid, non-riparian lands, the same law of necessity gives Kansas the right of water for domestic purposes. But no law of necessity gives Colorado the right to take all of the water, to the exclusion of every Kansas right.

By using all of the water, Colorado attracts from Kansas and elsewhere people to her boundaries. The more Colorado builds up her population upon the decline of Kansas, the greater the necessity in Colorado, and the right grows by what it feeds upon. Kansas has the same right to apply the doctrine of necessity that Colorado has; and it is as beneficial that the water should flow into Kansas and moisten its deep, black soil as that it should irrigate the sand and sagebrush of less fertile capacity in Colorado. But Kansas denies the doctrine of necessity and invokes the doctrine of the common law, and says that the law of necessity is no law at all, and that it is simply the doctrine of might and opportunity—the doctrine of the ability, power and inclination to take, and, while adapted to a more barbarous community or a ruder age, it is not a law as between states of the American union, and that the law of necessity has never received any recognition as between states. The law of necessity, the *lex ex necessitate rei*, may be in certain cases the law of individuals, but it is not and never was the law of states and nations, and is never asserted except as a prelude to war.

SEC. 59. The Underflow.—Allegations of Bill.

The bill definitely alleges that "the valley of the river is composed of sand covered with alluvial soil, and the river and the surface soil of the bottom lands in the state of Kansas are all underlaid with sand and gravel, through which *the waters of said river* have flowed from time immemorial"; that they extend in width under the entire valley of the river throughout its whole course in the state of Kansas; that "the natural course and flow of said river throughout its entire length in the state of Kansas is in and beneath the bed thereof and beneath the surface of the bottom lands of the entire valley of said river." It is stated that "the underflow is confined to the valley of the river and is coextensive with the valley"; that "the water which flows in the river from the state of Colorado into the state of Kansas furnishes the principal and almost the entire supply of water for the underflow in the valley of said river, and at its normal height the said underflow is of great and lasting benefit to the said bottom lands, both as to those which abut upon said river and as to those which do not"; that "if the surface flow of water in the bed of said river be wholly cut off from the state of Kansas, then the underflow will gradually diminish and run out."

The bill further states that the state of Kansas is the owner in fee simple of 640 acres of bottom land "situated within the valley of the Arkansas river," and that said land is "furnished with moisture, sufficient for the growing of crops thereon, *solely from the underflow of said river.*"

It is charged in the bill that the state of Colorado has diverted, and has authorized persons and corporations under her control to divert, water from the natural channel of the Arkansas river to arid lands not riparian to said stream; that said waters so diverted are thereby forever lost to such stream and prevented from flowing into or through the state of Kansas; that such diversion is carried to such an extent that no water flows in the bed of the stream from Colorado into Kansas during the growing season, and that the underflow is diminishing and continuing to diminish; and that, if such diversion continues to increase, the bottom lands of the valley will be injured to an enormous extent. And, finally, it is charged, upon belief, "that it is the *intention* of the state of Colorado to *divert absolutely all of the water that does, can or might flow down the Arkansas river into the state of Kansas, so that all of the water shall be used in the state of Colorado, and none whatever, either above or below the surface, that may by any possibility be utilized, shall cross the line into the state of Kansas.*"

Under such conditions, can the owner of land to which the underflow extends claim the protection of a court of equity? Counsel for Colorado admit that this "is probably a debatable question," if "the underflow is a fixed current, moving along settled lines and of a continuous character." Believing that the averments of the bill are amply sufficient to place the complainant's rights upon the debatable ground, as so fixed by the limitations of adverse counsel, we shall proceed to discuss the question and cite the authorities which are deemed applicable.

SEC. 60. Underflow.—Subsurface Water Rights.

Rights to the subsurface flow of a stream are fully recognized. (Burroughs v. Saterlee, 67 Iowa, 396.)

No distinction is made between these and such as are annexed to the surface flow. (Gould on Waters, § 281; Kinney on Irrigation, 123, 125, 478.)

"A well-defined and constant stream in a subterranean channel is protected to the owner as much as though it ran through a natural channel on the surface." (Keeney v. Carillo, 2 N. M. 480; Taylor v. Welch, 6 Ore. 198; Tampa Waterworks Co. v. Cline, 20 So. [Fla.] 780; Wheatley v. Baugh, 1 Casey, 528; Whetstone v. Bowser, 29 Pa. St. 59; Collins v. Gas Company, 131 id. 143; Willis v. City of Perry, 92 Iowa, 297; Good v. City of Altoona, 162 Pa. St. 493; Strait v. Brown, 16 Nev. 317.)

"The existence of a well-defined subsurface flow within the bed and banks of streams such as this is well recognized. Says Kin. Irr., sec. 44: 'At certain periods of the year water flows on the surface in a well-defined course, and there is at all times what is known as the underflow.' This is the broad and deep subterranean volume of water which slowly flows through the sand and gravel underlying the most, if not all, the streams which traverse the country adjacent to the mountain systems of the arid region. These underground streams are probably much greater in volume in some cases than the water upon the surface, and are, as far as rights of appropriation or riparian rights are concerned, but a valuable portion of the well-defined surface stream." (Vineland Irr. Dist. v. Azusa Irr. Co., 58 Pac. [Cal.], 1057.)

And these rights may be based upon the subsurface flow or underflow, as distinguished from the surface flow, where the former is continuous, well-defined, and capable of being definitely ascertained. (Kinney on Irrigation, § 48.) "When subterranean water flows in a distinct channel, an adjoining owner of land has no

more right to divert its course than if the stream were on the surface of the earth." (Burroughs v. Saterlee, *supra*.)

SEC. 61. Underflow.—Los Angeles v. Pomeroy.

"There is no dispute between the parties, and no conflict in the authorities, as to the proposition that subterranean streams flowing through known and definite channels are governed by the same rules that apply to surface streams. The cases in which this and cognate questions have been raised and decided are innumerable, and it would be an endless task to review or even to name them. No case involving directly the rights of parties in subterranean streams has been decided in this court, but the law, as applicable to the present case, is well epitomized in section 48 of Kinney on Irrigation, as follows: 'Subterranean or underground watercourses are, as their names indicate, those water currents that flow under the surface of the earth. A large portion of the great plains and valleys of the mountainous regions of the West is underlaid by a stratum of water-bearing sand and gravel, and fed by the water from the mountain drainage. This water-bearing stratum is of great thickness. The water is moving freely through it, is practically inexhaustible, and, if it can be brought to the surface, will irrigate a large portion of the country overlying it. In and near the mountains many streams have a bed which was originally a rocky canon, but has been filled up with boulders and coarse gravel. In this debris a large portion or all of the water sinks from sight, to reappear only when some rocky reef crosses the channel and forces the water to the surface. The movement of this water through the porous gravel, owing to the declivity of the stream, is often quite rapid, and a considerable volume may thus pass down the channel hidden from sight. These watercourses are divided into two distinct classes—those whose channels are known or defined, and those unknown and undefined. It is necessary to bear this distinction in mind

in our discussion, as they are governed by entirely different principles of law. And in this connection it will be well to say that the word 'defined' means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word 'known' refers to knowledge of the course of the stream by reasonable inference. Regarding the laws governing these two classes, it must be known that if underground currents of water flow in well-defined and known channels, the course of which can be distinctly traced, they are governed by the same rules of law that govern streams flowing upon the surface of the earth. The owner of land under which a stream flows can therefore maintain an action for the diversion of it, if such diversion takes place under the same circumstances as would enable him to recover if the stream had been wholly above ground. But for this purpose the underground water must flow in known and well-defined channels, so as to constitute regular and constant streams, in order that the riparian owner or appropriator may invoke the same rules as are applied to surface streams, or otherwise the presumption will be that they have their sources in the ordinary percolations through the soil. This rule practically disposes of the second class of subterranean waters—those whose channels are unknown and undefined—although there are undoubtedly a great many underground streams whose waters flow in confined channels, but whose courses are not known; and, following the above rule, these are all classed with 'percolating waters.' The point to be specially noted here is the meaning ascribed to the words 'defined' and 'known.' 'Defined' means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge; and the word 'known' refers to knowledge of the course of the stream by reasonable inference.' In this case the boundaries of the channel and the existence and course of the underground stream were unknown and undefined, except so far as they could be inferred; but there was a great amount of evidence from which a reasonable inference could be drawn that the channel was bounded and defined by the sloping sides of the Cahuenga and Verdugo hills meeting underground, and that there was

a subsurface flow corresponding with the surface flow from west to east out through the gap. Without any excavation beneath the surface, or other test or experiment, all this could be inferred from the topography of the country, the amount of rainfall, and the gradually augmenting volume of the surface stream in its approach to the narrowest point in the pass. And the court was certainly justified in submitting to the jury the question whether the subsurface flow was a part of the stream, unless the mere fact that it was forcing its way through sand and gravel and boulders deprived it of the character of a stream. Upon this point we are satisfied that the view of the superior court was the reasonable and just view, and not opposed to anything that has ever been decided in this court." (City of Los Angeles v. Pomeroy, 124 Cal. 597, 632.)

SEC. 62. Underflow.—Inferential Boundaries.

In the case just cited the boundaries of a channel and the existence and course of an underground stream were unknown and undefined, except so far as they could be inferred; but there was a great amount of evidence to support an inference that the channel was bounded and defined by the sloping sides of parallel ranges of hills meeting underground, and that there was a subsurface flow corresponding with the surface flow, and it was held proper to submit to a jury the question whether the subsurface flow was a part of the stream; and the question was held not to be affected by the fact that the subsurface stream forced its way through sand and gravel and boulders.

"In the case of Dickinson v. Grand Junction Canal Co., *supra*, POLLOCK, C. B., in delivering the opinion, said: 'When water is on the surface the right of the owner of the adjoining land to the usufruct of that water is not a doubtful matter of fact; it is public and notorious, and such a right ought, as a matter of course,

to be respected by every one; and indeed, if the course of a subterranean stream were well known, as is the case with many which sink underground, to pursue for a short space a subterranean course and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground. . . . If, then, the stream is diverted by altering its course or cutting down its banks, or the water abstracted from it for unauthorized purposes, the owner has his right of action against the wrong-doer." (Kinney on Irrigation, p. 123.)

A stream is none the less entitled to protection as a natural watercourse because it flows widely over, through and beneath an extensive area. There is no stronger case in its allegations and in its facts than the case at bar, because it is alleged and admitted that the underflow exists, that it is fed from the Arkansas river, that the underflow is in the valley of the river, and that the diversion of the river tends to destroy the underflow; that is to say, the same acts destroy both the river and the underflow. Therefore, the facts so strongly direct the inference that the underflow becomes a positive, indisputable natural stream.

SEC. 63. Underflow.—Case v. Hoffman.

The law relating to this specific condition of things is ably discussed and the decisions elaborately reviewed in the above case, as follows:

"A natural watercourse is also as well defined and the law that governs it stated in our own cases as anywhere. Says Chief Justice DIXON, in Hoyt v. Hudson, 27 Wis. 656: 'The term "watercourse" is well defined. There must be a stream, usually flowing in a

particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water.' The following streams are held to come within this definition: In Spelman v. City of Portage, 41 Wis. 144, the streams held to be watercourses were across the low grounds of considerable extent between said rivers, which had their origin in the overflow of the Wisconsin river to the Baraboo river, caused by unusual freshets. They had no well-defined channels or banks, but spread widely over the intervening ground. They came from one unquestionable watercourse and passed into another one, and did not lose their character as watercourses by passing and spreading over the intervening low ground. In Gillett v. Johnson, 30 Conn. 392, there was a living spring about sixteen rods from the dividing line, on the land of the defendant. It ran off in a stream that would fill a half-inch pipe. The supply was constant, except in a very dry time. For six or eight rods it ran rapidly, between abrupt banks, and in a well-defined channel. It then came to marshy ground, where it spread out, so that its flow was slight, in a sluggish current, but in a natural bed or depression, to a watering-place on the plaintiff's land. The defendant diverted the stream on his own land from the watering-place of the plaintiff. It was held to be a watercourse, and the defendant liable. In Macomber v. Godfrey, 108 Mass. 219, the stream came across a road onto the defendant's land in a well-defined channel, but when within five rods of the plaintiff's land, below, it spread out several rods in width, and so it ran upon the plaintiff's land, which was a flat and level meadow, where it irrigated it in a valuable manner, and there was no defined channel on the plaintiff's land; but a short distance below his land it again formed into a brook, with a channel and current, and so ran on and emptied into a river. Held to be a watercourse, which the defendant could not divert from the plaintiff's land. In Miller v. Laubach, 47 Pa. St. 154, the waters came from winter springs on defendant's land, and soon spread out and made his land wet and boggy, and they were

wont to pass onto the plaintiff's land, and there soon dry up by evaporation. The defendant cut a ditch on his own land, which gathered the waters together, and discharged them on the plaintiff's land in such a manner as to cause him great injury, by making his land wet and useless. The defendant was held liable. In Kauffman v. Griesemer, 26 Pa. St. 407, the stream came from springs on the plaintiff's land, which, increased by rains and snow, ran down on and through the defendant's land and emptied into a creek. They ran in a general channel, but their flow was not continuous. The defendant made a sod dam at his line, and thereby turned the waters back onto the plaintiff's land, to his injury. It was held that this stream was a watercourse, and governed by the maxim of the common law, '*Aqua currit et debet currere,*' and the plaintiff recovered. In Rhoads v. Davidheiser, 133 Pa. St. 226, 19 Atl. 400, it is held that even surface-water, if it run in a channel with banks and current, and in a certain direction, when there is water, although not continuously, is a watercourse, and governed by the same law. In Earl v. De Hart, 12 N. J. Eq. 280, it is held that when the country is such that the water from rains and melting snow is necessarily collected into one body, so large as to require an outlet, and is discharged through it in a well-defined channel, where it is accustomed to flow, and has flowed from time immemorial, such channel is an ancient natural watercourse. The common-law doctrine prevails in New Jersey. A spring without an outlet or inlet is not a watercourse, but if it have an outlet through a well-defined channel, it is a watercourse. (Village of Delhi v. Youmans, 50 Barb. 316.) Where a spring rises on one man's land, and from it a stream runs with a current and in a well-defined channel onto the land of another below, although it furnished no more water than the superior proprietor could use for domestic purposes and to water his land, he cannot divert or wholly consume it, to the detriment of the inferior owner. (Arnold v. Foot, 12 Wend. 330.) Smith v. Adams, 6 Paige, 435, is to the same effect. 'A spring, to be protected by the law, must be one which issues out of the earth by natural forces.' (Gould,

Waters, § 286.) A spring becomes a watercourse at the point where the water comes to the surface and flows off in a defined channel or bed, with banks or shores, which confine the water and cause it to run in a certain direction. (Id. § 41.) It must have a current, or it cannot be obstructed or diverted to any one's injury. If a watercourse is lost in a swamp or lake, it is still a watercourse if it emerges therefrom in a well-defined channel, or if it spreads over a meadow, and it can be identified or traced as the same stream, it is still a watercourse. (Id. § 264; Briscoe v. Drought, 11 Ir. C. L. 250; Munkres v. Railroad Co., 72 Mo. 514; Road Co. v. Harvey, 90 Ind. 192; Robinson v. Shanks, 118 id. 125, 20 N. E. 713.) 'If the channel and banks formed by running water present to the eye at a casual glance the unmistakable evidence of the frequent action of running water, then it is a natural watercourse.' (Gould, Waters, § 264.) I will close these citations by a very strong case in favor of the plaintiff's right, in this court. The plaintiff owned a mill at Cross Plains, on Black Earth creek. The creek had its rise in Mud lake, in another town, which lake was partially fed by springs, but mainly by rains and surface-waters, and out of it the waters flowed through an outlet into Black Earth creek, but the outlet had been considerably filled up. The defendant sought to excavate an outlet on the opposite side of said lake and draw off the water into a big marsh, and so eastwardly by Pheasant Branch into Lake Mendota, and wholly divert them from Black Earth creek, to the injury of the plaintiff's mill power. In Mohr v. Gault, 10 Wis. 513, Chief Justice DIXON said, in passing upon the above facts: 'The owners along the creek have a legal right to the natural and usual flow of the waters of the lake through it.' It is said also in the opinion, as it was also found by the trial court, 'that there was no perceptible fall or difference in the height of the surface of the lake from one end to the other. The depth of this lake was from two to seven feet, and the main body was covered by vegetation. The waters had been raised one and a half feet by the filling up of this outlet, and more than that by surface-waters running into it from the adjacent country.' The defendant sought to divert the waters of the lake in the

proposed direction, in order to drain his own land, covered by its waters to the depth of from a few inches to three feet. From this it appears that this lake is protected as a natural watercourse. Application may now readily be made of these principles and authorities to the waters described in the complaint." (Case v. Hoffman, 84 Wis. 438.)

SEC. 64. Underflow.—Evolution of the Law Relating Thereto.

The proprietor of land bordering on a surface stream of water has the right to receive the water of the stream from the proprietor above substantially undiminished in quantity and uncorrupted in quality. (Gould on Waters, § 204.) And, as stated in Tampa Water-works Co. v. Cline, *supra*, "this right exists, not from any supposed grant or prescription, but *ex jure naturæ*, and as an incident to the soil, and for the reason that surface streams of flowing water are the gift of providence, for the benefit of all lands through which they flow, and, as such, their usufruct is appurtenant to such lands." Upon just principles, the same general right is now held to exist in connection with subsurface streams.

The law as to subsurface waters has not been evolved, however, without much discussion and some contrariety of judicial opinion. The differences of opinion have resulted not so much from a dispute as to the principles of law which should justly govern, but rather, as might be expected, from the inherent difficulty of ascertaining definitely the facts concerning the character and extent of the right asserted. In Acton v. Blundell, 12 Mee. & W. 324, decided in 1843, it was held that the owner of land through which water flows in a subterraneous channel has no right or interest in it such as will enable

him to sue for diversion. But the doctrine of this case is opposed by Dickinson v. Canal Co., 9 Eng. Law and Eq. 513, and it is now obsolete. (See cases cited *supra*.) The "uncertainties which must ever attend subterranean waters" are still recognized by the courts. But as modern scientific experiments and engineering have gradually dispelled these uncertainties to a great degree the law of subterranean waters has been correspondingly clarified. The tendency of modern judicial decisions is to protect rights in subsurface waters equally with those which are annexed to surface-waters, and even to extend such rights beyond the limitations which were formerly conceived to be just.

SEC. 65. Underflow.—Forbell v. City of New York.

It has been recently held, in the above case, where the plaintiff made no claim that any surface stream or pond or any subterranean stream or channel was affected, but did complain that the defendant exhausted plaintiff's land of its accustomed and natural supply of underground or subsurface water, and thus prevented him from growing upon it the crops to which the land was peculiarly adapted, that the defendant was liable for the damages so caused. In a vigorous opinion, wherein it is stated that "the immunity from liability which the defendant claims violates our sense of justice," the court say:

"The defendant does not take from its own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land. The case is not one in which, because the percolation

and course of the subsurface waters are unobservable from the surface, they are unknown, and thus so far speculative and conjectural as to be incapable of proof or judicial ascertainment.

"Before the defendant constructed its wells and pumping stations it ascertained, at least to a business certainty, that such was the percolation and underground flow or situation of the water in its own and the plaintiff's land that it could by these wells and appliances cause or compel the water in the plaintiffs land to flow into its own wells, and thus could deprive the plaintiff of his natural supply of underground water. This it has accomplished, just as it expected to do it; the evidence to that effect is about as satisfactory and convincing as if the case were one of surface-waters.

"That the defendant has so used its own as to injure the plaintiff there is no question. The question is whether the plaintiff has or ought to have, in the just administration of the law, a remedy.

"In Smith v. City of Brooklyn, 160 N. Y. 357, a case in which the defendant, by means of the same acts and appliances as it employed in this case, lowered the water in the plaintiff's surface stream and pond, this court, in holding the defendant liable for the damage thus caused, carefully refrained from considering the question whether the defendant would have been liable if it had simply lowered the subsurface level or body of underground water not contributing to the supply of plaintiff's surface stream or pond.

"It may be conceded that the letter of the law, as expounded in many cases in this state, denies liability. (Ellis v. Duncan, 21 Barb. 230; Goodale v. Tuttle, 29 N. Y. 459; Pixley v. Clark, 35 id. 520; Village of Delhi v. Youmans, 45 id. 362; Phelps v. Nowlen, 72 id. 40; Bloodgood v. Ayers, 108 id. 400; Van Wycklen v. City of Brooklyn, 118 id. 424.)

"The earlier cases followed the law as stated in Acton v. Blundell, 12 Mee. & W. 324, and Greenleaf v. Francis, 18 Pick. 117. So far as the extraction or diversion of underground water upon the land of one proprietor affects no surface stream or pond upon the

neighboring land, but simply the underground water therein, the rule is still adhered to.

"The reasons usually assigned for the rule are, that the owner of the soil may lawfully occupy the space above as well as below the surface to any extent that he pleases; that the water stored or held in his soil, so long as it remains there, is, unlike water flowing in a surface stream, a part of the soil itself (Barkley v. Wilcox, 86 N. Y. 140); that a different rule would prevent the reasonable use and improvement of land; that without a grant or positive statute there can be no easement in one parcel of land for the subsurface support or supply of subsurface water in another parcel; that the percolation and underground flow of water are out of sight and their exact operation and courses are conjectural and not susceptible of actual observation and proof; and finally, that the damages, if any, are the remote or indirect consequences of lawful acts.

"It may be conceded that these reasons, or some of them, were ample to afford the proper rule of decision in the cases to which they were applied. We do not intend to impair their applicability to like cases. But there are features of this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing that the underground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from five to eleven square miles, would enable it to capture the greater part of it.

"In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized.

"In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land,

either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to its own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired.

"The learned trial judge found that the acts of the defendant were a trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We think the finding justified by the particular facts of this case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the cooperation of the forces of nature, and such is the case before us.

"The distinction between a case like this and the cases of percolating waters, in which liability has been denied, was well pointed out by the learned judge who wrote for the appellate division in Smith v. City of Brooklyn, 18 App. Div. 340. We refer to the opinion as a valuable contribution to the discussion of the subject.

"We more readily conclude to affirm, because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes; it does wrong under the letter of the law, in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in the previous cases in the light of the cases themselves. We recognize the fact that the water-supply of a great city is of vastly more importance than the celery and watercresses of which the plaintiff's land was so productive,

before the defendant encroached upon his water-supply. But the defendant can employ the right of eminent domain, and thus provide its people with water without injustice to the plaintiff." (164 N. Y. 522.)

SEC. 66. Underflow.—Smith v. City of Brooklyn.

In the above case, found in 18 N. Y. App. 340 (affirmed in 160 N. Y. 357), which is approved in the Forbell case, it was held that the erection at a distance from a city, upon land purchased by the city, whose soil admits of the ready percolation of water, of city water-works, consisting in part of wells and a conduit about twenty-seven feet below the surface of the ground, connected with powerful suction-pumps, the effect of which is to lower the spring level of the surrounding country and to dry up a stream nearly half a mile distant, which was fed by springs, and had run in a well-defined channel for fifty years, forming, when dammed, a pond valuable to the owner of the land, is an unjustifiable use by the city of the land acquired by it, and renders the city liable in damages to the owner of the pond. In the course of the opinion it is said:

"'An owner of the soil may divert percolating water, consume or cut it off with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of the land is the absolute owner of the soil, and of percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface.' This doctrine cannot be questioned, although it was *obiter* to the decision. In this respect it is in harmony with many of the discussions which have been had of the subject. The decisions of this state, ancient and modern, are committed to this view of the law, including this tri-

bunal. (Ellis v. Duncan, 21 Barb. 230; Bloodgood v. Ayers, 108 N. Y. 400; Van Wycklen v. City of Brooklyn, 118 id. 427; Covert v. City of Brooklyn, 6 App. Div. 73.)

"Admitting this doctrine to the extent to which these and other authorities in this state carry it, does it fit the facts of the present case? It may be stated, with some degree of confidence, that no case will be found in this state, and our research has not enabled us to find one in any other state of this country, where the right has been upheld in the owner of land to destroy a stream, a spring or well upon his neighbor's land, by cutting off the source of its supply, except it was done in the exercise of a legal right to improve the land or make some use of the same in connection with the enjoyment of the land itself, for the purposes of domestic use, agriculture, or mining, or by structures for business carried on upon the premises. We are aware that the doctrine has been carried beyond this in England, but it has not yet been judicially declared here. (Chasemore v. Richards, 7 H. L. 349.) The present case, as we view it, differs radically from any reported case that we are able to find in this country. While it is true that the city owned the land upon which it placed its structure, and all of its acts were done upon its own property, it did not, however, make the erections or do the acts for the beneficial use and enjoyment of the land itself for any purpose of domestic use, agriculture, mining, or manufacturing, as land was used in the cases which have arisen in this country. No one dwelt thereon, or was expected to; no one used the water thereon, nor was it expected to be used in connection therewith. The sole purpose was to subordinate the use of the land to the particular purpose of a reservoir and conduit, in which to gather, store and carry water to a distant place, for its benefit and profit, and for the enjoyment of strangers, who have no claim or shadow of right to it as against the plaintiff. It was its purpose not only to take the water which might come by natural percolation upon its land, but also to use artificial means, and by powerful suction drain the adjoining land of its water. This purpose has been accomplished, and by the construction of its conduit, the sinking of its wells and the

suction of its powerful pumps the whole spring level of the surrounding country has been lowered and running streams and ponds dried up. In view of these facts, let us examine the principle which underlies the right to percolating water, and the reasons upon which it rests. It is not necessary that we should set them out herein at length, for they have been admirably stated and the cases reviewed, from the leading case of Acton v. Blundell, 12 Mee. & W. 324, decided in the exchequer court of England by Chief Justice TINDALL, in the modern decisions of this country, in two cases—one in Pennsylvania (Wheatley v. Baugh, 25 Pa. St. 528), and in Ohio (Frazier v. Brown, 12 Ohio St. 294). In the last case the learned judge who wrote stated the principle and the reasons therefor in the following language:

"'The reasoning is briefly this: In the absence of express contract and of positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing or filtrating through the earth, and this mainly from considerations of public policy—(1) because the existence, origin, movement and course of such waters, and the causes which govern and divert their movements are so secret, occult, and concealed, that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible; (2) because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.'

"It seems clear from the reasoning of these cases that the right which exists and which has been upheld relates to the beneficial use of the land for some purpose for which the land can be used, connected with its enjoyment as land for the ordinary purpose of agriculture, mining, domestic use, or improvement, either public or private. In New Hampshire this view even has never obtained. The courts of that state have ably maintained the doctrine of correlative rights and obligations between owners of land respecting the right to take and use percolating water, holding that the author-

ity to take rests upon the right of reasonable use, applying thereto the maxim *Sic utere tuo ut alienum non lædas* (Bassett v. Salisbury Manufacturing Co., 43 N. H. 569; Swett v. Cutts, 50 id. 445), which is also the doctrine contended for by Lord WENSLEYDALE, to be hereafter noticed. This maxim has been rejected by our courts, as applied to the right of use by a landowner of his land for the purposes already adverted to. But the reasoning of the cases is quite convincing against an extension of the doctrine beyond its present limit.

"It needed no occult power to foresee that the construction of these water-works would drain a large part of the territory contiguous thereto, and seriously diminish the water-supply of adjoining owners. The conduit was conducted lower than the surrounding territory; the soil was of a character which admitted of ready percolation of water; and the object of the construction was to secure water. This was not an experiment. It was known that, if the proper excavations were made, channels created for water to run in, wells sunk, and suction applied, the result would be to draw water to that construction. It is true that one might not be able to see just where the subterranean channel existed through which the water percolated, or how much water was retained in any particular pocket or fissure; nevertheless it was known, as well as though seen, that, if these means were adopted, the result would be to draw the water to that place from the adjoining lands and streams as certainly as though the open mouth of the conduit tapped a running stream and took it all. It is quite probable, also, that the drain will continually increase. Powerful suction drawing the water in one direction necessarily creates channels; by the continuous running of the water therein its action wears away barriers and changes the formation which formerly held it, letting it run quicker and in increased quantities to the common goal. We may speculate much or little upon the question of where the property right begins in water that descends from the heavens, whether it could be legally caught by roofs and stored before entering the ground, or whether it must be permitted to fall and enter the earth. Such questions will be disposed of, undoubtedly, as they arise. We have the fact admitted

by all legal writers that a property right exists in percolating water of as high a character as the right to the land itself; it is, in fact, a part of the land. It is a valuable right, and its use is usually indispensable to the enjoyment of the land wherein it is found. This right is only qualified by the equal right of every adjoining landowner. The right of use is supported in either when, for purposes of use upon the land, or of the land, injury results to one as an incident to such use. But it seems to me monstrous to assert that one landowner may deliberately and intentionally make an erection for the express purpose of draining the land of another of its percolating water, and thereby destroy streams, springs, ponds, and wells, and be supported in so doing upon the theory that it is the exercise of a legal right in the use of his land. An adjoining owner has no right to tunnel into another's land for water or minerals or take away soil lying under the surface. But, if this doctrine is to be supported, he may erect upon his own land an appliance which will draw out all the water, which would otherwise remain, without liability; and if water, why not the minerals and the soil? So far as property right is concerned, one is as much land as the other. The reason upon which the right has been supported to divert percolating water fails when applied to such conditions, as such right is limited to such water as naturally flows upon the land and not to a flow artificially created. So use your own property as not to injure another, is a maxim as old as civilized man, and binding both in law and morals. It may be saved and applied to percolating water, and still support our prior decisions, by placing the limitations upon it which reason and justice suggest." (18 N. Y. App. 340.)

SEC. 67. Underflow.—Natural Right.

If it is "monstrous to assert that one landowner may deliberately and intentionally make an erection for the express purpose of draining the land of another of its percolating water," what may be said of the erection of plants for the purpose of draining, appropriating and

diverting from a landowner the entire supply of water derived from a continuous, well-defined and easily ascertained underflow—particularly when that underflow constitutes a part of the waters of a great national river which is shown upon the map of every elementary geography in the land? It will not do to say, in this day of magnificent engineering and scientific achievement, coupled with a human ingenuity and activity hitherto unparalleled in the history of mankind, that an individual, body corporate or sovereignty can divert and appropriate subterranean waters of enormous value under cover of obsolete rules of law applicable to farmyard wells and hillside springs. When a landowner can reduce the matter of appropriating his neighbors' natural supply of underground water to "a business certainty," as said in the Forbell case, *supra*, his neighbors are entitled to legal protection. The ancient idea (Frazier v. Brown, 12 Ohio St. 294), that the workings of subsurface waters are so secret, occult and concealed that an attempt to administer any set of legal rules in respect to them would be impossible, does not fit any such conditions. In the language of Mr. Justice HATCH, in Smith v. City of Brooklyn, *supra*, "It needed no occult power to foresee that the construction of these waterworks would drain a large part of the terrritory contiguous thereto, and seriously diminish the water-supply of adjoining owners."

Natural water rights capable of being ascertained for purposes of destruction cannot be said to be so "secret, occult and concealed" as to be beyond legal protection. It requires no occult power to locate, appropriate and manipulate the underflow in the valley of the Arkansas

river. It is a natural current, continuous, fixed, and well defined. It is highly beneficial to the land under which it flows. The defendant, by its demurrer, practically asserts the doctrine that a landowner can be intentionally deprived of a greater part or all of this fixed current, not merely by the appropriation of the subsurface flow, but by the *drainage of the surface stream of a great national river for purposes which are not riparian!* Such a doctrine is intolerable. It violates every sense of justice, and it has the support of neither reason nor authority.

SEC. 68. Kansas Irrigation Laws.

The defendant in its brief refers to the irrigation laws of Kansas, and attempts to use them as an argument in favor of Colorado; this is untenable. The state of Kansas has especial regard for the rights of riparian owners, and to the fullest extent concurs in the doctrines of the common law. Irrigation laws may be made subject to common-law rights; and because a state may pass an irrigation law it does not follow that such law in anywise abolishes common-law or riparian rights. The state of Kansas, while giving the right to build irrigating ditches, has expressly provided for the payment of damages to all those who are injured by the building of irrigating ditches. If a riparian owner considers himself damaged, there is a tribunal before which he can present his claim.

The Kansas theory is that the taking of water from a stream and using it for irrigation is the same as taking land for railroads or other public purposes--all those who are damaged by the taking can apply to the courts

for relief; and there is no reason why irrigating ditches should not be built and water should not be used if the persons who build the ditches pay all the damages occasioned thereby. And as this is the Kansas doctrine, so also we hold the same to be the federal doctrine, as shown by section 46 hereof.

The law concerning the payment of damages to riparian owners and to others whose rights are invaded by the construction of irrigating ditches in Kansas is found in General Statutes of 1889, sections 3524 to 3533, inclusive.

Again, what right has Colorado to cite the irrigation laws of Kansas? Water does not run up-hill. If Kansas should use up all the water of the Arkansas river after it came into Kansas, Colorado could not be heard to complain. It is no concern of Colorado. If Kansas should cheat Oklahoma, Colorado is not interested except in a purely ethical and sentimental way, which ought to be first expressed towards Kansas under present conditions. It is illogical for Colorado to say, "We will not do right by you because, if we did, you will act wrongly toward Oklahoma." As well might a debtor say to his creditor, "I will not pay you my debt because you will not use the money to pay yours." Colorado has no right to question what Kansas will do with the water when it crosses its border, and Kansas disclaims any duty of accountability to Colorado for the use of the water when it has reached Kansas territory; but it may not be amiss to say that Kansas has observed, and at all times intends to observe, the obligations and rights due to riparian owners.

It is also proper to call attention to the fact that

there can be no dispute such as this between Kansas and Oklahoma, because the Arkansas river passes through a humid region before it reaches Oklahoma, and is reinforced by the Little Arkansas river, the Ninnescah river, the Walnut river, and many minor streams. Oklahoma will never have cause for complaint against the actions of Kansas, and no irrigating canal in Oklahoma will ever suffer for water from the Arkansas river, if one were ever contemplated. Nor has Colorado the right to impute an intention to Kansas of treating other states unfairly in the future.

SEC. 69. State Sovereignty.

If the common law is the rule that should govern the conduct of state toward state; if states have as between themselves riparian rights on rivers navigable or unnavigable, the same as individuals; if Kansas holds in trust for the people and the public the bed of the Arkansas river and other property abutting thereon, and if Colorado is taking the water from the river and building itself up on the deprivations of Kansas, then Colorado has only one defense, and that is the doctrine of state sovereignty, to which we have alluded. It says of our contention, "The bill attacks the sovereignty of the state." (Point 12, p. 57.)

If the doctrine of state sovereignty can be invoked in this present case, then no suit can be brought either in Kansas or Colorado by any citizen of either against any citizen of either. The state sovereignty would cure all defects and make all acts under it legal, and what was thus legally done in one state could not be examined elsewhere, nor could damage or injury

resulting from such acts be a subject of judicial cognizance anywhere. As the taking of water from the Arkansas river and diverting it to arid and non-riparian lands is not interstate commerce, but interstate wrong, it cannot be justified by congress, as we have before stated, nor can congressional acts add force to the claim of state sovereignty.

When the constitution of Colorado was formed and received congressional sanction, that constitution and that sanction were subject to and limited by the rights of Kansas. Otherwise the constitution of Colorado would be unconstitutional. It has often been held that a state constitution may be itself unconstitutional.

Stewart v. Jefferson, 116 U. S. 131.
New Orleans v. Louisiana, 115 id. 650, 672.
Gunn v. Barry, 15 Wall. (U. S.) 610.
White v. Hart, 13 id. 646.
Railroad v. McClure, 10 id. 511.

The mere fact that congress approved the constitution of Colorado cuts no figure, and gives it no added validity.

"Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the constitution of the United States." (Gunn v. Barry, 15 Wall. [U. S.] 610.)

We call attention to the fact that all of the amendments to the constitution of the United States were adopted prior to the admission of Colorado as a state.

The state sovereignty of one state must not conflict with the state sovereignty of another state. State sovereignty must yield to the constitution of the United States and the amendments thereto. If the laws and constitution of Colorado are matters of state

importance, state right, and state concern, why is not the resistance to such laws on the part of Kansas a matter of state importance, state right, and state concern? If the United States can take up the cause of one of its citizens against a foreign power that is violating treaty rights, why cannot Kansas take up the cause of citizens who are injured by Colorado in violation of treaty rights equally solemn, viz., the compact of the constitution? The citizens of Kansas cannot sue the state of Colorado, and it is proper that Kansas, as a state, when her citizens are injured by another state, should seek and demand redress. This is the rule established by civilized nations.

The responsibility in the decision of this pending case between Kansas and Colorado is very great, for at some time in the future it will affect every state in the union which has a stream flowing into it from another state. The rule of decision herein to be adopted will affect sooner or later every state in the union; and as population becomes dense questions will more frequently arise; and when in the future the supreme court of the United States shall have assumed the position for which it is intended, that of a great international court, charged with the duty of formulating international law, it will be for the interest of the world that a fixed rule be now adopted which will be forever right.

SEC. 70. Concerning the Plea of Laches.

It does not comport with sovereign dignity for a state to say, We have wronged you so long that you cannot now complain. We do not believe that the plea of the statute of limitations, or the doctrine of laches, which

is the same thing under another phrase, pertains to states. We do not believe that one sovereignty can plead it against another sovereignty, nor that one state can plead it against another state. No wrong inflicted by one nation on another or by one state on another can be so old and moss-grown and become so revered by age as to make it right. Between states there are neither statutes of presumption nor repose. No writer has laid down a rule by which length of time transforms a vested wrong into a vested right. It is beneath the dignity of any state or sovereignty to admit the doing of a wrong by a plea of confession and avoidance. We will therefore consider the plea made by the state of Colorado in this case to be in its nature evidential; that is, that the state of Colorado sets forth that the rights claimed by Colorado must be legal, because as evidence thereof the state of Kansas has, through a long series of years, made no assertion of their illegality.

In looking for congressional legislation upon this subject, we find that prior to the admission of Colorado into the union there was no act except the above-entitled act of July 26, 1866, and the following (being the act of July 7, 1870, 16 S. L. 218; Rev. Stats. 2340), in existence:

"All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section." (See 40 hereof.)

For convenience, we attach to this brief as appendix A all laws ever enacted by the United States concerning irrigation up to date.

Up to the admission of the state of Colorado, there were only two decisions in the United States supreme court in any wise bearing upon the subject of irrigation. They were 20 Wall. 507 and 670, and these two cases were simply cases between persons claiming under the different appropriation of water rights, and did not in any manner bring into question the rights of riparian ownership.

Before the admission of Colorado as a state, there were no other federal decisions than the above, except the Union Mill cases in Nevada (Fed. Cas. Nos. 14,370 and 14,371), in which the doctrine of riparian rights was discussed by Judge HILLYER, and in which the judge says:

"A stream of running water is part and parcel of the land through which it flows, inseparably annexed to the soil, and the use of it as an incident to the soil passes to the patentee of the land."

Again:

"Water for irrigation is not a natural want in the same sense that water for quenching thirst is, which a riparian proprietor may satisfy without the rights and needs of proprietors below."

Hence, upon the admission of Colorado there was little learning upon the subject of irrigation—practically no decisions thereon, and the legislation was cloudy and dimly understood. But Judge HILLYER did say in the last case above cited:

"Prior to the passage of this act [of 1866], the policy of congress had been, as shown by its legislation, to grant to purchasers of the public land the bed of a non-navigable stream flowing through the land sold, and the lines of sections were run without reference to the meanderings of said stream, so that the purchaser of

land through which a non-navigable stream flowed took the bed of the stream and such riparian rights to the water of the stream as belonged to the owner of the soil."

That is to say, that before the passage of the act of 1866 the owners of land in Kansas, whether they purchased from the government or from other sources, took their land with the usual common-law riparian rights.

Turning now to the desert-land act, under which the state of Colorado is acting, and the provisions of which act are stated in the brief of Colorado to have been accepted in the year 1895, it will be noticed that the desert-land act did not apply originally to the state of Colorado, and never did apply until by act of March 3, 1891. (26 S. L. 1095, 1 Supp. R. S. 941.) And the state of Colorado did not accept the benefits until the year 1895. (Colorado Laws 1895, p. 157.) So, therefore, the state of Kansas, admitting certain rights to exist to the water in Colorado, and admitting the necessity of the state of Colorado to use water for domestic and mining purposes, feels that the injuries complained of have been a gradual and recent encroachment. It is stated in the bill that part of the property specially purchased by the state of Kansas for the use of public institutions — the reformatory lands — were purchased in 1889, and that since the purchase their value has been diminished by the acts complained of. Certainly, as between states, a growing encroachment through thirteen years, most of the encroachment being recent and impending, would not be evidence that the state of Kansas recognized a right as being legal, or had consented to a condition of things that would fix a permanent status.

In suits between states, the same law of laches has not been applied as has been applied between individuals. In Rhode Island v. Massachusetts, 15 Pet. 233, a suit was brought to reestablish a state boundary line. Massachusetts had been holding adversely for over 100 years. The supreme court of the United States did not take kindly to the plea of laches, and finally overruled it, and heard the case on the facts and decided it on the facts. (4 How. 591.)

SEC. 71. Public Trust Negatives Laches.

But separate and apart from this, the state of Kansas, as the owner of the bed of the Arkansas river in Kansas, cannot be held to have consented to the encroachments in Colorado.

If when Kansas became a state it became a state upon the same terms as the original colonies became states (16 Pet. 367), and if the title to the soil under the bed of the Arkansas river became vested in the state of Kansas as did also the water running over the said soil, and if it is the duty of the state of Kansas, as trustee for the people and the public, to preserve the subject of the trust, then, as such trustee, it can neither grant away those rights, nor can the people or the public lose those rights, either by the laches of the state of Kansas or by any title or prescription, because that which the state of Kansas cannot do by voluntary act and grant it cannot do by negligence or inaction. It is its duty, therefore, to enforce these rights which it holds in trust for the people and the public, or for any of the people or public who, as beneficiaries, claim to be wronged or damaged.

Such is clearly the doctrine of this court enunciated in the Illinois Central Cases, 146 U. S. 347, in which the court says, speaking of the title of the state to lands under the beds of navigable rivers:

"It is a title held in trust for the people of the state, . . . and it is not within the legislative power of the state to abdicate this trust by a grant whereby it surrenders its property and general control," etc.

The above is the syllabus. The following is in the opinion:

"The control of the state for the purposes of the trust *can never be lost*, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . .

"The state can no more abdicate its trust from property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. . . .

"So with trusts connected with public property or property of a special character, like lands under navigable waters: they cannot be placed entirely beyond the direction and control of the state."

Hence, the duties of the state of Kansas are analogous to the duties of a trustee, and the duties of a trustee are, that the beneficiaries of the trust shall not suffer from failure to enforce the trust. And the state of Kansas, being charged with this trust, is in duty bound to assert the rights of the people and the public, and to see that no diminution of those rights results from the acts of the state of Colorado.

Therefore, we say that neither the facts nor the law will favor the supposition that Kansas has lost any rights by forbearance in this case. The forbearance has only been such an exhibition of interstate comity and friendship as induced the state of Kansas to wait until the injury should be demonstrated beyond all doubt or conjecture.

It will be noticed in the Illinois Central Cases, above referred to, the state of Illinois brought the suit to remedy the evils complained of in the same manner as the state of Kansas brings the present suit against Colorado, and that the rights claimed by the parties dated back to a charter given in 1851; and it will be further observed, in the subsequent case of the Illinois Central v. Chicago, 176 U. S. 646, decided in the year 1900, the former ruling of the court was distinctly approved and confirmed.

SEC. 72. Colorado Statutes.

In appendix B we have set forth certain Colorado constitutional provisions and statutes with reference to the appropriation and uses of waters in that state. We have also copied the act making an appropriation and provision for the construction of state ditches to divert waters from the Arkansas river at or near Canon City, in said state, for which the state claims the right to take water to the amount of seven hundred and fifty-six and $\frac{28}{100}$ cubic feet per second. (Bill, p. 17.)

We have also set forth the statutes of Colorado which make appropriation and provision for the construction of state reservoirs on the Apishapa creek, in Las Animas county, Colorado; on certain streams in Chaffee county,

Colorado; also in the county of Custer; and also near the head of Monument creek, in El Paso county, Colorado, all of these acts providing for the taking of waters from the tributaries of the Arkansas river, to be used and distributed upon arid non-riparian lands, in accordance with the allegations of the bill. We have also included an act passed by the legislature of Colorado at its session in 1899, providing for the leasing of such reservoirs to the counties in which they are situate, with the evident view of perpetuating their existence and relieving the state from the expense of maintaining them.

At the recent session of the legislature of Colorado, held in 1901, a general act was passed containing provisions for the construction and maintenance of public irrigating ditches and reservoirs and for the transfer of ditches and reservoirs now constructed or in process of construction from private to public ownership. This act is of such great length that we have merely printed the title and a reference thereto in the appendix herewith.

SEC. 73. Conclusion.

In conclusion, we desire to say that the defendant has shown no good reason why this action ought not to be maintained, but, on the contrary, there is an abundance of reason in law and in justice why the issues presented by our bill should be heard and granted.

The complainant is injured by the acts of the defendant in both its corporate and sovereign capacities. The defendant's acts are done both directly, by officers and agents, and indirectly, by persons and corporations acting under authority granted by it.

The demurrer admits that the damage already done

the state of Kansas is very great and the threatened injury will destroy two of its most important institutions. It is also admitted that great injury has resulted to the property situate in that valley, with a consequent diminution of the revenues of the state, and that the people and the state will suffer loss beyond calculation if threatened diversions be permitted.

The taking of the water from the Arkansas river and its tributaries in Colorado, and the consequent wrongs upon Kansas and its people, are excused on the ground of statutory authority therefor. We have shown that the statutes of the United States grant no authority for such acts. As the statutes of Colorado have no extra-territorial effect, they cannot authorize or justify acts which directly damage property outside the state.

Hence the demurrer of the defendant should be overruled.

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Attorney-general of the State of Kansas,

EUGENE F. WARE,
S. S. ASHBAUGH,
Solicitors for Complainant.

TOPEKA, KAN., January 23, 1902.

APPENDIX A.

IRRIGATION LAWS OF THE UNITED STATES.

(1.) Water Rights and Right of Way.

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." (Act July 26, 1866; 14 Stat. L. 253; Rev. Stat., § 2339.)

(2.) Homestead Subject to Water Rights.

"All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section." (Act July 9, 1870; 16 Stat. L. 218; Rev. Stat., § 2340.)

(3.) Purchasing and Reclaiming Desert Land.

'Be it enacted, etc., That it shall be lawful for any citizen of the United States, or any person of requisite age, 'who may be entitled to become a citizen, and who has filed his declaration to become such,' and upon payment of twenty-five cents per acre, to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter,

Provided however that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of

water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water-supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey.

At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him.

Provided, That no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form." (Act Mar. 3, 1877; 19 Stat. L. 377, §1; 1 Supp. R. S. 137.)

(4.) Desert Land Defined.

"That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land-office in which said tract of land may be situated." (Act Mar. 3, 1877; 19 Stat. L. 377, §2; 1 Supp. R. S. 137.)

(5.) What States Applicable To.

"That this act shall only apply to and take effect in the states of California, Oregon and Nevada, and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the commissioner of the general land-office." Act Mch. 3, 1877; 19 Stat. L. 377, §3; 1 Supp. R. S. 137.) This act was amended by act of Mar. 3, 1891, as hereinafter set out. (See §14 hereof.)

(6.) Appropriation, Geological Survey.

(Par. 10.) "For the salary of the Director of the Geological Survey, which office is hereby established, under the Interior Department, who shall be appointed by the President by and with the advice and consent of the Senate, six thousand dollars:

Provided, That this officer shall have the direction of the Geological Survey, and the classification of the public lands and examination of the geological structure, mineral resources and products of the national domain; and that the Director and members of the Geological Survey shall have no personal or private interests in

the lands or mineral wealth of the region under survey, and shall execute no surveys or examinations for private parties or corporations;

(1) And the Geological and Geographical Survey of the Territories, and the Geographical and Geological Survey of the Rocky Mountain Region, under the Department of the Interior, and the Geographical Survey, West of the One hundredth Meridian, under the War Department, are hereby discontinued, to take effect on the 30th day of June, 1879." (Act Mar. 3, 1879; 20 Stat. L. 377; 1 Supp. R. S. 251. See Rev. Stat. 2406.)

(7.) Appropriation; Surveys; Reservations.

(Par. 4.) "For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, . . . the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior. . . . And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals (3) are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law: *Provided*, That the President may at any time in his discretion, by proclamation, open any portion or all of the lands reserved by this provision to settlement under the homestead laws." (Act Oct. 2, 1888; 25 Stat. L. 505; 1 Supp. R. S. 626.)

(8.) Appropriation; Survey and Report.

(Par. 4.) "*Irrigation Survey:* For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation and the segregation of irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and for ascertaining the cost thereof, and the prevention of floods and overflows, and to make the necessary maps, . . . and the Director of the Geological Survey, under the supervision of the Secretary of the Interior, shall make a report to Congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoirs, and an itemized account of the expenditures under this and any future appropriation." (Act Mar. 2, 1889; 25 Stat. L. 939; 1 Supp. R. S. 698.)

(9.) Restoration; Title; Entries.

(Par. 3.) "So much of the act of October second, 1888, entitled, 'An act making appropriations for sundry civil expenses of the

Government for the fiscal year ending June thirtieth, 1889, and for other purposes,' as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed.

And all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted,

Except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to (1) acquire title to more than 320 acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act:

Provided, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States. (Act Aug. 30, 1890, ch. 837; 26 Stat. L. 371; 1 Supp. R. S. 791.)

(10.) Filing of Plan.

"That at the time of filing the declaration herein before required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements. (Act Mar. 3, 1891; 26 Stat. L. 1095, amending act Mar. 3, 1877; 1 Supp. R. S. 940.)

(11.) Expenditure in Improvements.

"That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the

party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled.

Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre:

Provided, That proof be further required of the cultivation of one-eighth of the land." (Act Mar. 3, 1891; 26 Stat. L. 1095, amending act Mar. 3, 1877; 1 Supp. R. S. 940.)

(12.) Existing Claims Perfected.

"That this act shall not affect any valid rights heretofore accrued under said act of March third, 1877, but all *bona fide* claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed." (Act Mar. 3, 1891; 26 Stat. L. 1095, amending act Mar. 3, 1877; 1 Supp. R. S. 941.)

(13.) When Patents to Issue.

"That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands but this section shall not apply to entries made or initiated prior to the approval of this act.

Provided, however, That additional proofs may be required at

any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States." (Act Mar. 3, 1891; 26 Stat. L. 1095, amending act Mar. 3, 1877; 1 Supp. R. S. 941.)

(14.) Applicable to Colorado.

"That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act;

And no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located." (Act Mar. 3, 1891; 26 Stat. L. 1095, amending act Mar. 3, 1877; 1 Supp. R. S. 941.) (See §5 hereof.)

(15.) Transfers before Patent.

"Any *bona fide* settler under the preemption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim." (Act Mar. 3, 1891; 26 Stat. L. 1095, substitute for § 2288, Rev. Stat.; 1 Supp. R. S. 942.)

(16.) Location of Reservoirs.

(SEC. 17.) "That reservoir sites located or selected and to be located and selected under the provisions of 'An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred eighty-nine, and for other purposes,' and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs." (Act Mar. 3, 1891; 26 Stat. L. 1101; 1 Supp. R. S. 945.)

(17.) Right of Way.

(SEC. 18.) "That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its later-

als, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch:

Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation,

And the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories." (Act Mar. 3, 1891; 26 Stat. L. 1101; 1 Supp. R. S. 946.)

(18.) Map to be Filed by Company.

(SEC. 19.) "That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land-office for the district where such land is located a map of its canal or ditch and reservoir; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way.

Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." (Act Mar. 3, 1891; 26 Stat. L. 1102; 1 Supp. R. S. 946.)

(19.) Act Applicable; Proviso.

(SEC. 20.) "That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land-office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it:

Provided, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncom-

pleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture." (Act Mar. 3, 1891; 26 Stat. L. 1102; 1 Supp. R. S. 946.)

(20.) Restriction of Right.

(SEC. 21.) "That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch." (Act Mar. 3, 1891; 26 Stat. L. 1095; 1 Supp. R. S. 947.)

21. Desert Land Grants to States.

(SEC. 4.) "That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the Act entitled 'An Act to provide for the sale of desert land in certain States and Territories,' approved March third, eighteen hundred and seventy-seven, and the Act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this Act, as thoroughly as is required of citizens who may enter under the said desert-land law." (Act Aug. 18, 1894, ch. 301; 28 Stat. L. 422; 2 Supp. R. S. 259.)

(22.) Plan to be Filed.

"Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized

to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement." (Act Aug. 18, 1894, ch. 301; 28 Stat. L., 422; 2 Supp. R. S. 259.)

(23.) Issue of Patents.

"As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled:

Provided, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury not otherwise appropriated, one thousand dollars." (Act Aug. 18, 1894, ch. 301; 28 Stat. L. 422; 2 Supp. R. S. 260.)

(24.) Right of Way through Public Lands.

(SEC. 1.) "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber." (Act Jan. 21, 1895; 28 Stat. L. 635; 2 Supp. R. S. 367.)

(25.) Reservoirs on Public Lands.

(SEC. 1.) "That any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such live stock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes:

Provided, That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

(SEC. 2.) "That any person, live-stock company, or corporation desiring to avail themselves of the provisions of this Act shall file a declaratory statement in the United States land office in the district where the land is situated, which statement shall describe the land where such reservoir is to be or has been constructed; shall state what business such corporation is engaged in; specify the capacity of the reservoir in gallons, and whether such company, person, or corporation has filed upon other reservoir sites within the same county; and if so, how many.

(SEC. 3.) "That at any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this Act, shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office in the district in which such reservoir is located a map or plat showing the location of such reservoir, which map or plat shall be transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him, and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

(SEC. 4.) "That congress may at any time amend, alter, or repeal this Act." (Act Jan. 13, 1897; 29 Stat. L. 484; 2 Supp. R. S. 537.)

(26.) Occupation of Reservoir Sites.

(SECTION 1.) "That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe:

Provided, That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate. (Act Feb. 26, 1897, 29 Stat. L. 599; 2 Supp. R. S. 563.)

APPENDIX B.

"The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes." (Sec. 6, Art. 16, Const. of Colo. 1 Mills An. Stat. of Colo., p. 364.)

"All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes, for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation." (Sec. 7, Art. 16, Const. of Colo. 1 Mills An. Stat. of Colo., p. 376.)

"All persons who claim, own or hold a possessory right or title to any land or parcel of land within the boundary of the state of Colorado, as defined in the constitution of said state, when those claims are on the bank, margin or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream, creek or river for the purposes of irrigation, and making said claims available to the full extent of the soil, for agricultural purposes." (Sec. 2256, 1 Mills An. Stat. of Colo., 1891, p. 1361.)

"When any person owning claims in such locality has not sufficient length of area exposed to said stream to obtain a sufficient fall of water to irrigate his land, or that his farm, or land used by him for agricultural purposes, is too far removed from said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of land which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for the purposes hereinbefore stated." (Sec. 2257, 1 Mills An. Stat. of Colo., 1891, p. 1380.)

"Persons desirous to construct and maintain reservoirs, for the purpose of storing water, shall have the right to take from any of the natural streams of the state and store away any unappropriated water not needed for immediate use for domestic or irri-

gating purposes; to construct and maintain ditches for carrying such water to and from such reservoir, and to condemn lands for such reservoirs and ditches in the same manner provided by law for the condemnation of land for right of way for ditches: *Provided*, No reservoir with embankments or a dam exceeding ten feet in height shall be made without first submitting the plans thereof to the county commissioners of the county in which it is situated, and obtaining their approval of such plans." (Sec. 2270, 1 Mills An. Stat. of Colo., 1891, p. 1385.)

"SECTION 1. Water claimed and appropriated for domestic purposes shall not be employed or used for irrigation or for application to land or plants in any manner to any extent whatever: *Provided*, That the provisions of this section shall not prohibit any citizen or town or corporation organized solely for the purpose of supplying water to the inhabitants of such city or town from supplying water thereto for sprinkling streets and extinguishing fires or for household purposes." (Laws of Colo. 1891, p. 402.)

AN ACT empowering the board of penitentiary commissioners to construct ditches, canals, reservoirs and feeders with convict labor, and to appropriate water from the Arkansas river for beneficial purposes; to issue receipts or certificates for money advanced; make rules and regulations for the sale of and leasing water, and making an appropriation therefor. (Approved April 19, 1889. In force April 19, 1889. L. 1889, p. 285.)

2483. (*Penitentiary Commissioners may use Convict Labor to Construct Ditches.*) That, for the purpose of reclaiming, by irrigation, state and other lands, and for the purpose of furnishing work for the convicts confined in the state penitentiary, the board of commissioners of the state penitentiary is hereby authorized to locate, acquire and construct, in the name of and for the use of the state of Colorado, ditches, canals, reservoirs, and feeders, for irrigating and domestic purposes, and for that purpose may use convict labor of persons confined, or that may be confined, as convicts in the state penitentiary at Canon City. (L. 1889, p. 285, §1.)

2484. (*State Engineer Survey Ditches from Arkansas River.*) The state engineer, under the direction of the board, shall survey, lay out and locate a ditch or canal upon the most feasible route on either side of the Arkansas river, which said ditch or canal shall be of sufficient capacity to cover at least thirty thousand acres of good arable land between Canon City and Pueblo: *Provided*, That work shall only be commenced and performed upon one main ditch, canal, reservoir or feeder at a time; that a second shall not be commenced until the completion of the first. (L. 1889, p. 285, §2.)

2485. (*Board Given All Rights and Powers.*) The said board is hereby given all the rights and powers that an individual or corporation now has, or may hereafter have, under the laws of the state, or of the United States, to acquire the right of way over,

upon and to any lands necessary for it to use or occupy in the construction and maintenance of said ditches, canals, reservoirs or feeders. (L. 1889, p. 286, § 3.)

2486. (*Title Shall Vest in State.*) That the title to all ditches, canals, reservoirs, or feeders, so constructed under this act, shall vest and remain in the state of Colorado, and the proceeds thereof shall be paid into the state treasury. (L. 1889, p. 286, § 4.)

2487. (*Contract for and Lease Water Rights.*) That when any part of any ditch, canal, reservoir or feeder shall be constructed under this act, said board of penitentiary commissioners may contract for and may lease water rights, upon such terms and under such rules and regulations as may be adopted by said board and approved by the governor of the state, to such individuals or corporations as may desire to lease the same. (L. 1889, p. 286, § 5.)

2488. (*Certificates Issued for Subscriptions Draw Interest—How Payable.* That for the purpose of aiding in the construction of said ditches, canals, reservoirs and feeders, the said board is hereby authorized to receive subscriptions and advancements of money from persons owning land along the line of said proposed ditches, canals, reservoirs and feeders, or persons desiring the construction of the same, and to issue receipts or certificates to such person or persons so advancing money for the amount thereof, which receipt or certificate shall draw interest at the rate of seven per cent. per annum, and both principal and interest shall be payable in water to be taken from said ditches, canals, reservoirs or feeders, under such rules and regulations as may be adopted by said board and the state engineer, and approved by the governor of the state. (L. 1889, p. 286, § 6.)

2489. (*Appropriation for Materials.*) There is hereby appropriated, out of any money in the treasury not otherwise appropriated, for the purpose of locating and paying for powder, fuse, tools, teams and material used in the construction of said ditches, canals, reservoirs and feeders, as provided for in this act, the sum of ten thousand dollars. (L. 1889, p. 286, § 7; Mills Stat. Colo., vol. I, p. 1434.)

AN ACT in relation to a public reservoir on the Apishapa creek, in the county of Las Animas and state of Colorado, and for other purposes.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. That there is hereby appropriated out of any moneys in the state treasury belonging to the internal-improvement permanent fund and any moneys which may be hereafter credited to said fund not otherwise appropriated the sum of fifteen thousand dollars for the construction of a reservoir on the Apishapa creek, in the county of Las Animas, for the storage of the surplus waters of said creek, to pay for surveying the same.

SEC. 2. Said reservoir shall be erected at some suitable place to be determined by the state engineer, west of the Denver & Rio Grande railway, on or near the Apishapa creek.

SEC. 3. The governor, secretary of state and state engineer are hereby constituted a board, under whose supervision and control said reservoir shall be located and constructed. Said board shall take charge of said reservoir, until otherwise provided by law, and make all proper regulations for the sale or disposal of the waters stored therein.

SEC. 4. Said reservoir shall be the property of the state, and all lands covered by said reservoir, or required for the use of ditches, shall be vested in the state of Colorado, prior to the letting of contracts for construction of such reservoir or ditches.

SEC. 5. Said reservoir shall be constructed in accordance with plans and specifications prepared by the state engineer. The board shall advertise for bids, and let the contract to the lowest responsible bidder.

SEC. 6. The auditor of state is hereby empowered to draw warrants for the payment of the expenses of location and construction of said reservoir upon vouchers certified by said board: *Provided*, That if there is no cash in the treasury belonging to said fund, then the state auditor is hereby authorized to sell any warrants or other securities in his hands belonging to said fund: *Provided*, Such securities shall not be sold for less than par and accrued interest thereon: *Provided further*, That after survey and estimates of the cost of the construction of said reservoir this appropriation shall be found insufficient for the construction of said reservoir, or if it shall appear to the governor and state engineer that the benefits to be derived by the state of Colorado are not sufficient to warrant the expenditure, then no part of this appropriation shall be used except so much thereof as shall be necessary to pay for such survey and estimates.

SEC. 7. Upon the completion of said reservoir the board appointed in section 3 of this act shall take such steps as shall be necessary to sell or lease such waters as will in the judgment of said board bring in the most revenue to the state.

SEC. 8. All moneys received from the sale or leasing of the water stored in said reservoir and from any water rights sold, either in connection with lands belonging to the state or otherwise, shall be paid to the state treasurer and by him credited to the internal-improvement permanent fund.

SEC. 9. No part of the money herein appropriated shall be used for the purchase of land or right of way.

Approved April 16, 1891. (Laws of Colo. 1891, p. 345.)

AN ACT to provide for the construction of reservoirs, and the storage and supply of water to supplement the supply at certain seasons in the flow of certain natural streams of the state, in Chaffee county, and to provide penalties for damaging the same, and providing an appropriation therefor.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. There is hereby appropriated out of any money in the state treasury belonging to the internal-improvement income fund, and any money which may hereafter be credited to said fund,

and not otherwise appropriated, the sum of fifteen thousand dollars, or so much thereof as may be necessary for the construction of one or more reservoirs, to be used for the conservation, storage and distribution of flood waters (and waters flowing in said creeks), and for the purpose of supplying the deficiency existing at certain seasons of the year in the supply of water flowing in the Cottonwood creek, Chalk creek, and the South Arkansas river, in Chaffee county, Colorado, for the irrigation of lands which are or hereafter can be irrigated by waters taken from said creeks: *Provided*, That no part of said appropriation shall be used for the purchase of land.

SEC. 2. Said sum of fifteen thousand dollars shall be expended by dividing the same among the streams named, equally, or applying the full sum so appropriated to any one or more of said streams, under the direction of the board provided for in section 3 of this act, and as they may deem proper.

SEC. 3. The governor, state engineer and chairman of the board of county commissioners shall be and hereby are constituted a board for the purpose of constructing said reservoir or reservoirs, and shall have power if, after the examination and measurements made by the state engineer as hereinafter provided, they shall conclude that two reservoirs could be constructed with the money hereby appropriated, and that they would more efficiently than one subserve the purposes hereby sought to be accomplished, to cause said two reservoirs to be constructed: *Provided*, That the total cost of said two reservoirs shall not exceed the sum of fifteen thousand dollars hereby appropriated: *And provided further*, That, if after proper examination and survey, the board shall determine that it is not practicable and feasible to construct any reservoir at the place herein designated, or that the same cannot be properly constructed with the sum appropriated by this act, together with such private donations and subscriptions as may be tendered to the board, or in the opinion of said board the expenditure of the sum herein appropriated in the construction of said reservoir or reservoirs shall not be deemed expedient and for the best interest of the whole people of the state of Colorado, then no portion of said appropriation shall be expended except so much as may have been necessary to defray the expenses of such examination and survey as may have been required by this act or ordered by the board.

SEC. 4. As soon as practicable after the passage of this act, the state engineer shall make or cause to be made under his direction, such measurements of the flow of water in said creeks, and such examination and surveys as he may deem necessary to determine the feasibility of the construction of a reservoir or reservoirs at the place, and for the purposes herein set forth, and shall make to the said board of construction a report in full of his proceedings therein, and of his conclusions; and if he shall determine that it is practicable to construct said reservoir or reservoirs, he shall report to said board whether or not it is advisable to construct one or two reservoirs, and shall submit therewith plans and specifications therefor.

SEC. 5. Upon the receipt of the report of the state engineer, and after such further examination and investigation, if any, as the board may deem necessary, the said board shall determine whether any reservoir shall be constructed under the provisions of this act, and if so, whether one or two reservoirs shall be constructed; and if it be determined that one or more reservoirs shall be constructed, then the board shall adopt plans and specifications therefor, and shall advertise for bids for the construction thereof in accordance with said plans and specifications. The contract for construction shall be let to the lowest responsible bidder, and the board may require the contractors to give bonds with approved security for the faithful performance of their duties as contractors.

SEC. 6. The auditor of state is hereby authorized to draw warrants for the payment of the examinations and surveys provided for in this act, and for the construction of said reservoir or reservoirs, upon vouchers certified to by the aforesaid board, not exceeding the aggregate sum of twenty-five thousand dollars.

SEC. 7. The said reservoir or reservoirs, when so constructed, and the waters therein, when so collected and stored, shall be the property of the state, and all lands on which shall be constructed said reservoir or reservoirs or the works connected therewith, shall first be vested in the state of Colorado, and until otherwise provided by law shall be under the charge, management and control of the said board of construction, and the said waters shall, under such rules and regulations as the board may prescribe, and shall be sold or leased by said board as said board may deem best, and all moneys received from the sale or lease of said water, whether the same shall be sold along with lands belonging to the state, or otherwise, shall be turned in to the state treasurer, and by him credited to the internal-improvement income fund.

SEC. 8. Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired, under or by virtue of the laws of Colorado.

SEC. 9. Any person wilfully damaging any reservoir constructed under the provisions of this act, or any of its approaches or appurtenances, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and imprisonment.

Approved April 16, 1891. (Laws of Colo. 1891, p. 347.)

AN ACT to provide for the construction of a reservoir or reservoirs at the most convenient and suitable place or places, to be selected by the state engineer, in township twenty-one (21), range sixty-nine (69) west, in the county of Custer, to appropriate money for the payment of the same, and to provide for the regulation of the flow of water therefrom and to maintain the expenses thereof.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. There is hereby appropriated out of any money in the state treasury belonging to the internal-improvement perma-

nent fund, and any money which may hereafter be credited to said fund and not otherwise appropriated, the sum of ten thousand dollars, or as much thereof as may be necessary, as hereinafter provided, for the construction of a reservoir or reservoirs, at the most convenient and suitable place or places, to be selected by the state engineer, in township 21, range 69 west, in the county of Custer, to store the waters of the Hardscrabble creek and its tributaries, for the purpose of irrigation, and other beneficial uses.

SEC. 2. As soon as practicable after the passage and approval of this act, the state engineer shall make the necessary arrangements for measuring the flow of water in said Hardscrabble creek, with a view of constructing a reservoir or reservoirs, of sufficient capacity to hold a part or a sufficient quantity of the waters of Hardscrabble creek and its tributaries above said reservoir or reservoirs. Said state engineer shall thereafter calculate and determine the required capacity of such reservoir, or reservoirs, to stow the waters flowing in said creek or so much thereof as may be necessary during the months of April, May and June of each year, and prepare plans and specifications thereof.

SEC. 3. The governor, state engineer and attorney-general shall be and hereby are constituted a board for the purpose of constructing said reservoir, or reservoirs and taking charge of same until otherwise provided by law.

SEC. 4. Upon the preparation of the plans and specifications by the state engineer, it shall be the duty of said board to advertise for bids in accordance therewith, and thereupon they shall let the contract to the lowest responsible bidder.

SEC. 5. The auditor of state is hereby authorized to draw warrants for the payment of the expenses of building said reservoir, or reservoirs, upon vouchers certified to by the aforesaid board, not exceeding the said sum of ten thousand dollars.

SEC. 6. That the said reservoir, or reservoirs, and water-works, and the waters when so collected and stored, shall be the property of the state, and the water so supplied shall be turned into Hardscrabble creek or canals for the purpose of supplying water for appropriations heretofore made or hereafter to be made, in the order of such appropriation by the several canals and reservoirs taken from said stream. The state engineer, or in his stead such person or persons as may be duly appointed for that purpose according to law, shall determine, regulate and provide for the delivery of such water to such ditches, canals and reservoirs according to their several appropriations, decrees of court, capacities and necessities.

SEC. 7. Nothing in this act shall be construed so as to impair any rights acquired or that may be acquired under or by virtue of the irrigation laws of the state of Colorado.

SEC. 8. When said reservoir, or reservoirs, are completed, together with the approaches, the expense of maintaining and keeping them in repair shall be by the persons using and having a

direct benefit from the use of the water therefrom and persons to whom a greater supply of water is received by the storage of water in the aforesaid reservoir or reservoirs.

SEC. 9. Any person interfering with or damaging said reservoir or reservoirs, or parts or appurtenances thereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year.

Approved April 9, 1891. (Laws of Colo. 1891, p. 350.)

AN ACT to provide for the construction of a reservoir near the head of Monument creek, upon or adjacent to sections 15 and 22, township 11, range 67 west, in the county of El Paso; to appropriate money for the payment of the same, and to provide for the regulation of the flow of water therefrom; and to provide a penalty for interfering with or damaging such reservoir.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. There is hereby appropriated out of any money in the state treasury belonging to the internal-improvement permanent fund and any money which may hereafter be credited to said fund, and not otherwise appropriated, the sum of thirty thousand dollars, or as much thereof as may be necessary, as is hereinafter provided, for the construction of a reservoir at Monument creek, upon or adjacent to sections 15 and 22, township 11, range 67 west, in the county of El Paso, to store the water of floods for the purpose of irrigation, and other beneficial uses: *Provided*, That no part of said appropriation shall be used for the purchase of land, and that the said reservoir shall not be constructed except upon lands the title to which shall first be vested in the state: *And provided further*, That all citizens of the state shall have equal rights to the use and benefits of said reservoir when constructed, subject only to such reasonable rules and restrictions as may be provided by law.

SEC. 2. As soon as practicable after the passage and approval of this act, the state engineer shall make the necessary arrangements for measuring the flow of water in said Monument creek, with a view of constructing a reservoir of sufficient capacity to hold the waters that may result from storms in that portion of the state drained by said Monument creek and above said reservoir; said state engineer shall thereafter calculate and determine the required capacity of a reservoir to store the waters flowing in said creek, and prepare plans and specifications thereof.

SEC. 3. The governor, state engineer, and attorney-general shall be, and hereby are constituted, a board for the purpose of constructing said reservoir and taking charge of the same, until otherwise provided by law: *Provided*, That if, after proper examination and survey, the board shall determine that it is not practicable and feasible to construct said reservoir at the place herein designated, or that the same cannot be properly constructed with the sum appropriated by this act, together with such private donations and subscriptions as may be tendered to the board, or if in

the opinion of the board the net revenue to be derived from said reservoir will not warrant the expenditure required for the construction thereof, or for other reasons, said board shall not consider the construction of said reservoir expedient and for the best interest of the people of the whole state, then no portion of said appropriation shall be expended, except so much as may have been necessary to defray the expenses of such examination and survey.

SEC. 4. Upon the preparation of the plans and specifications by the state engineer, it shall be the duty of said board to advertise for bids in accordance therewith, and thereupon they shall let the contract to the lowest responsible bidder.

SEC. 5. The auditor of the state is hereby authorized to draw warrants for the payment of the expenses of building said reservoir, upon vouchers certified to by the aforesaid board, not exceeding the said sum of thirty thousand dollars: *Provided*, That if there is no cash in the treasury belonging to said fund, then the state auditor is hereby authorized to sell any warrants or other securities in his hands belonging to said fund: *Provided*, Such securities shall not be sold for less than par and accrued interest thereon.

SEC. 6. That the said reservoir and the waters, when so collected and stored, shall be the property of the state; and the water so supplied shall be disposed of by sale to those desiring the same, the rates per cubic foot per second of time therefor to be fixed by the said board; the payments thereof to be made to said board, payable annually in advance, on or before May 1 of each year. The income derived from the sale of such water to be paid into the state treasury and placed to the credit of the internal-improvement permanent fund.

SEC. 7. Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired, under the virtue of the irrigation laws of the state of Colorado.

SEC. 8. Any person interfering with or damaging said reservoir, or any of its approaches or appurtenences, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year.

Approved April 16, 1891. (Laws of Colo. 1891, p. 352.)

AN ACT to provide for the leasing and distributing of the waters stored or to be stored in state reservoirs.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. The board of county commissioners of any county wherein is situated any state reservoir shall have charge and control of such reservoir, and shall, without expense to the state of Colorado, maintain and keep said reservoir in good condition and provide for the storage of water, as contemplated in the act providing for the construction of said reservoir, and also for the distribution of said water, under the direction of the water com-

missioner for the district in which said reservoir is situated, at such times as the scarcity of water in the stream which such reservoir is intended to reenforce demands that the water in said stream should be replenished for the purpose of irrigating the lands under ditches now or hereafter to be constructed: *Provided*, That said waters shall be distributed by said water commissioner *pro rata*, without reference to priority of water rights and without expense to consumers thereof: *And provided also*, That the counties in which said reservoirs are situated assume and shall be held responsible for any damages resulting from breakage of the dams or water discharges therefrom: *And provided further*, That the provisions of this act shall not apply to any state reservoir constructed primarily for the purpose of irrigating state lands, but and such reservoir shall remain in the control of the state board of land commissioners.

SEC. 2. In the opinion of the general assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage.

Approved April 7, 1899. (Laws of Colo. 1899, ch. 140, p. 350.)

Chapter 87, Laws of Colorado, 1901, p. 198:

"AN ACT to provide for the organization and government of irrigation districts and to provide for the construction of canals and reservoirs and the acquiring of canals already constructed or partly constructed; for the acquiring of the rights of way to construct irrigation ditches, canals, reservoirs, and to acquire other property; and for the dividing of certain portions of the territory of the state of Colorado into irrigation districts; and for said irrigation districts to vote bonds for the purpose of constructing irrigation canals or reservoirs; for the purpose of buying or purchasing by said irrigation districts of irrigation canals or reservoirs already constructed, or partially constructed, and other property, paying for the same; providing for a system of revenue to be raised by taxation upon the property in said irrigation districts and by tolls to pay the interest and principle [principal] of said bonds, and to pay current expenses and for property acquired, and the manner in which the same shall be done; the holding of elections in said districts for the purpose of electing officers and raising revenues; also providing for the increase, enlargement, dismemberment and disorganization of said districts."

[This act is composed of 61 sections. It is therefore too long to be copied here. The title to the act, however, indicates its purpose.]

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